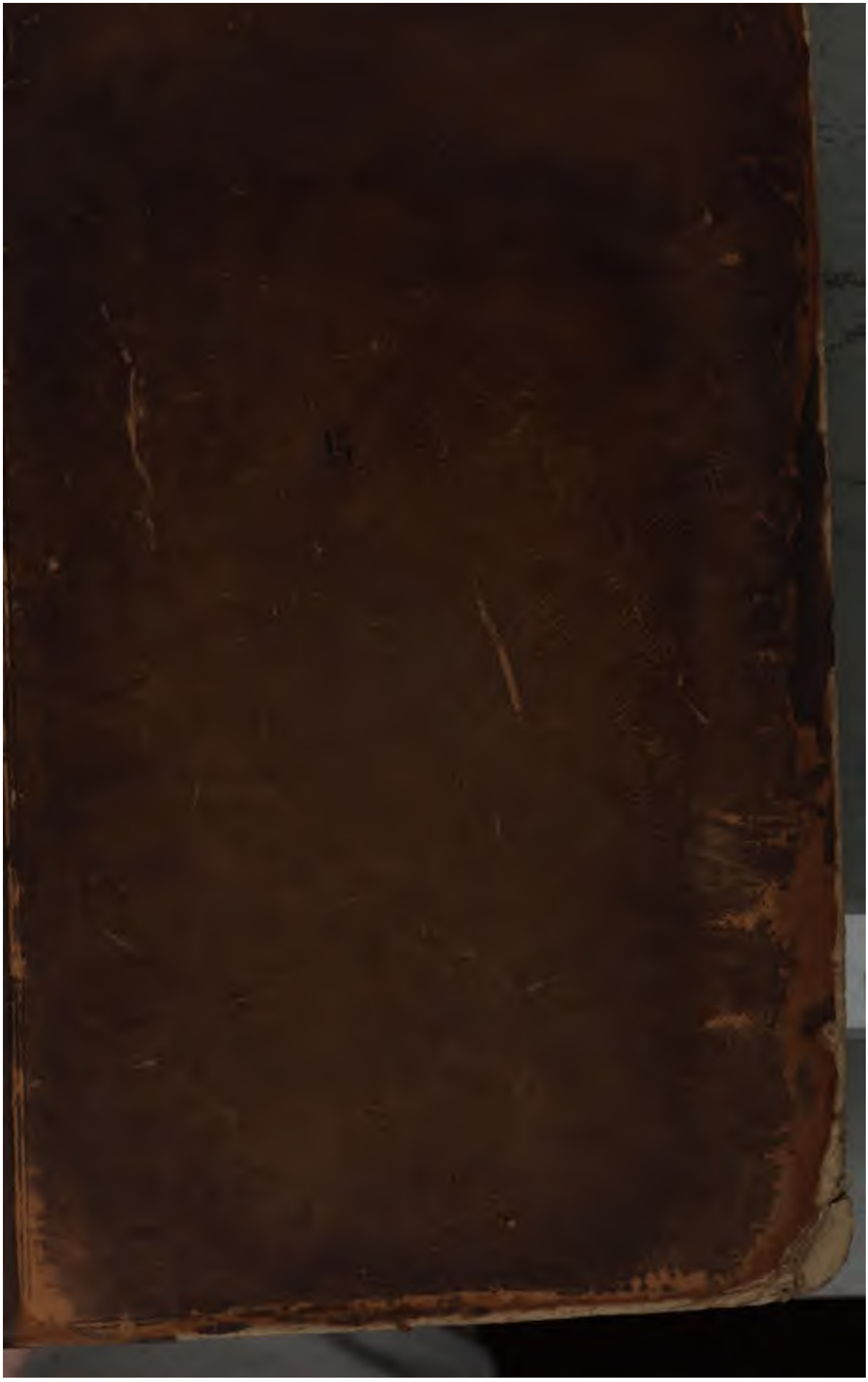


COMMENTARIES

ON

LAW,

EMBRACING CHAPTERS ON

THE NATURE, THE SOURCE, AND THE HISTORY OF LAW;

ON

INTERNATIONAL LAW, PUBLIC AND PRIVATE;

AND ON

CONSTITUTIONAL AND STATUTORY LAW.

BY

FRANCIS WHARTON, LL.D.,

MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW,

AUTHOR OF TREATISES ON CONFLICT OF LAWS, ON CRIMINAL LAW, ON EVIDENCE, AND ON CONTRACTS.

PHILADELPHIA:

KAY & BROTHER,

LAW BOOKSELLERS, PUBLISHERS, AND IMPORTERS.

1884.

Sumner Fund

COLLINS PRINTING HOUSE,
705 Jayne Street.

PREFACE.

In the following pages it is attempted, for the use of students of all classes, to give an exposition of what may be called public law. In the first three chapters are considered successively the nature, the source, and the history of law; and it is maintained that law, as a rule of action, is the product of the conscience and need of the nation by which it is adopted. But a nation, in this sense, to be a law-maker, does not act intermittingly in public assemblies, voting at particular epochs after public notice and solemn debate. The laws which are really operative, and of which all enduring and efficient statutes are merely declaratory, are emanations rather than efforts; are the products and not the moulders of custom; are the instinctive and unconscious outgrowth of the nation, and not the creatures either of *à priori* political speculation or of arbitrary sovereign decree. A nation, to be a law-maker in this sense, is not the majority of a particular people as it exists at a particular time. It comprises that people as wrought up in one continuous body with those who preceded it as part of a common race; and hence the people of the United States, as primary law-makers, form one with the people of England who evolved the jury system, who made parliament the supreme power of the land, who won the petition of right from Charles I. and the writ of *habeas corpus* from Charles II., and who achieved

the revolutionary settlement of 1688.[1] In this sense the law which obtains in the United States is not a scheme invented by statesmen at a particular crisis, but is the silent and spontaneous evolution of the nation, past as well as present, adapting itself to the conditions in which in each epoch it is placed. I am far from underrating the ability with which this view is contested by the analytical school of English jurists, of whom Hobbes and Austin are among the most conspicuous representatives;[2] nor do I deny that in the ordinary processes of courts of justice, a law, to be formally executed, must in some sense have received the approval of the local sovereign. But I maintain that not only must law both precede and define sovereignty, but that no law imposed by a sovereign can be permanently operative unless it is declaratory of existing conditions;[3] and I maintain, further, that it is only by accepting this solution that we can rightly understand and construe either the law of nations or the distinctive public law of the United States.

I. First as to the law of nations. It is impossible, as we will hereafter observe, to conceive of international law without taking into consideration the past; it is impossible to apply it without considering how far it is moulded by the conditions of both past and present. In the United States this is peculiarly necessary. There can be no question that under the strain of the late civil war the government of the United States, finding itself in the unexpected and unfamiliar attitude of a belligerent, was disposed for a time to tear itself from its traditions, and unduly to exaggerate belligerent rights. But a nation cannot permanently abandon a traditional policy when that policy is not only the product of its

[1] *Infra*, §§ 22, 62, 64, 86, 111, 364.

[2] *Infra*, §§ 6, 47, 91 *et seq.*

[3] As sustaining more or less completely this position may be cited Bacon, *infra*, §§ 22, 63, 86; Hooker, *infra*, §§ 33, 47, 86; and Burke, *infra*, §§ 27, 33, 365.

natural conditions, but is wise and humane. In deference, therefore, not only to our traditions, but to the interests of humane civilization in general, we should insist that the rights of neutrals should be so far protected as to make neutrality safer than war, and thus to diminish the temptation to belligerency. The rights of nations at peace should be resolutely guarded; the prerogatives of nations at war should be strictly limited; and in this way the inducements to war lessened and the benefits of peace enhanced. It is to promote these results that the Institute of International Law, of which I have the honor to be a member, was founded; and the positions taken in the following pages are in the main in accordance with the views adopted by the great body of my distinguished colleagues in that institute. These positions are as follows:—

(1) International law appeals primarily to the sense of right among nations.[1]

(2) The tendency of modern civilization is towards the enlargement of homogeneous liberal sovereignties, each more or less charged with the maintenance of just and comprehensive international rules;[2] and the effect of the late civil war in the United States, in establishing the indissolubility of the Union and exhibiting its great military capacity and the energy and courage of its citizens both northern and southern, has been to place it in the front rank of such sovereignties.[3]

(3) Deference to the rights of small sovereignties is a duty incumbent on great sovereignties.[4]

(4) All governments which now exist are based more or less remotely on revolution; and consequently no sovereign can claim recognition as such simply on the ground of legitimacy.[5]

[1] *Infra*, § 121.
[2] *Infra*, § 134.
[3] *Infra*, §§ 134, 596.
[4] *Infra*, § 138.
[5] *Infra*, § 145.

(5) Territory is inviolable, necessity being the only ground on which one sovereign can as such attempt to exercise authority in the territory of another sovereign with whom he is at peace.[1]

(6) Interference by the sovereign of one country with the political relations of another country, is only justifiable when requisite for self-defence, or for the preservation of public peace.[2]

(7) The sea is open to all nations, but the ships of every civilized nation are to be regarded as part of the country whose flag they bear, and as equally inviolable.[3]

(8) No sovereign, therefore, is entitled, by his cruisers, to arrest and search the vessels of another sovereign on the high seas, unless (*a*) in pursuance of treaty, or (*b*) on probable cause shown of piracy, or (*c*) in the exercise, in time of war, of the belligerent right of seizing contraband articles.[4]

(9) While privateering, so far as it involves the scouring the seas by irresponsible private cruisers, applying to their own use their captures, is not in conformity with modern international law, this does not preclude the adoption by a belligerent of volunteer ships of war, and the issuing to them of letters of marque and reprisal; and so far from this right being inconsistent with liberal and humane civilization, it is conducive to the interests of such civilization by lessening the inducement to keep up immense permanent navies.[5]

(10) Plunder of private property on the high seas is as wrong in principle as is plunder of private property on land; and, though the claims of belligerents to capture enemy's goods when found on enemy's ships on the high seas may be too generally sanctioned to be now disputed, it should

[1] *Infra*, § 146.
[2] *Infra*, § 174.
[3] *Infra*, § 188.
[4] *Infra*, §§ 194 *et seq.*
[5] *Infra*, § 201.

not be extended to seizure of neutral goods on enemy's ships, or of enemy's goods on neutral ships.[1]

(11) The rule that a neutral is precluded from furnishing to a belligerent armed troops and armed vessels is not to be strained so as to break up freedom of trade between neutrals and belligerents; nor is any nation obliged to establish, in order to promote non-intercourse of this class, a domestic police, inconsistent from its vastness, its rigor, and its expense, with free institutions, nor to undertake precautionary outlays and armaments which would make peace more burdensome and despotic than war.[2]

(12) Private international law is so far part of the common law, that it will be regarded as controlling all litigated questions which are not settled by peremptory local legislation.[3]

II. Then as to the public law of the United States.—That the constitution of the United States was the result neither of sovereign edict nor of philosophic speculation, but that it was the product of the occupation of our territory by a population of various nationalities, among whom the English race was dominant, is shown in detail in the fourth chapter of this volume.[4] To several important consequences of this position,

[1] *Infra*, § 218.

[2] *Infra*, §§ 239, 251.

[3] *Infra*, §§ 252 *et seq.*

[4] *Infra*, §§ 19, 359 *et seq.*

Mr. Freeman, in his Impressions of America, pp. 279 *et seq.*, vindicates this position with much force in a passage which closes as follows: "Their work" (that of the framers of the constitution of the United States) "not being 'original' has lived on; it has gone through the most frightful of trials; but it abides, and promises long to abide. The 'original' work of the men" (the leaders of the French Revolution) "who strove to break with the past in all things has another tale to tell. Revolutions, restorations, tyrannies, new schemes warranted to last forever, and breaking down at the first trial of their strength; such is the outcome of 'originality' in political institutions, a fruit of which happily neither branch of the English folk has tasted."

It was not until after the printing of the body of this work, that I met with the Johns Hopkins University Studies on Local Institutions, containing articles, bearing on the points above stated,

it may be sufficient at this point to advert in advance of the discussion hereafter to be undertaken.

(1) For the primary exposition of the constitution, we are to look, not to the individual opinions of members of the convention by which it was framed, but to the past and contemporaneous condition of the people from whom, as a continuous body, it emanated.[1] Nor is even the opinion of the people, as declared, if we can suppose such a case, in assembly at any special crisis, to be regarded as such an exposition; since the nation, which is the author of laws, is, as we have seen, the nation in continuity, its present being the accumulation of its past.

(2) The perpetuity of the United States, as a union of perpetually sovereign states, is the result of conditions in themselves perpetual. (*a*) No such empire could permanently endure unless by distribution of local authority in local sovereignties; and the traditions of the United States require that the depositaries of such authority should be the states.[2] The natural conditions of the country, taking into consideration the characteristics of the people, make its retention in a common system a necessity. The Alleghenies, the Missisippi

by Mr. H. B. Adams on the Germanic Origin of New England Towns, on Saxon Tithing Men in America, on Village Communities of Cape Anne, and on Norman Constables in America; by Mr. A. Shaw, on Local Government in Illinois; by Mr. E. Ingle, on Parish Institutions of Maryland; by Mr. J. Johnson, on Old Maryland Manors; by Mr. E. R. L. Gould, on Local Government in Pennsylvania; by Mr. B. J. Ramage on Local Government in South Carolina; and by Mr. A. Johnson, on the Genesis of a New England State. These essays are of great interest as illustrating the evolution of law as stated *infra*, §§ 16 *et seq.*

I may also call attention to an article on the constitution of the United States, in the London Quarterly Review, for January, 1884. In this article, which did not appear until my own chapter on the constitution was printed, the reviewer adopts, as a striking illustration of the position for which I contend, the words of Professor Seeley, that the colonial assemblies "were not formally instituted, but grew up by themselves, because it was of the nature of Englishmen to assemble."

[1] *Infra*, §§ 359, 360, 611.

[2] *Supra*, § 363.

River, the Rocky Mountains, do not divide, but cement. The perpetuity of these conditions was illustrated by the results of the secession movement of 1860. They showed that while there could be no separation without civil war, there could be no civil war without reunion.

(3) The constitution, as framed in 1790, was defective in failing to give expression to the national convictions in two important particulars. It left the people of the states open to encroachments on their personal rights by (*a*) the Federal government, and by (*b*) the State governments. The first of these defects was cured by the group of amendments adopted shortly after the constitution went into operation. The second defect was cured by the group of amendments which were adopted at the close of the civil war, and which protect the people of the states from state legislation establishing unjust discriminations, or taking away rights except by equitable settlement. The two lines of amendments do not alter the equipoises of the constitution. They declare, and do not modify, its essential meaning,[1] as they bring out in complete symmetry the system of which the constitution was the partial expression.[2]

(4) While the relations of the sovereign states which constitute the union to each other and to the Federal government continue constant, each sovereignty is in a condition of continual growth and development in the application of its powers within the boundaries of its own department. The boundaries remain indelible, perpetual, and inviolable. Forever unchanged endure the sovereignties of the people of the states, and the sovereignty of the Federal government supreme over all in its allotted sphere. But so far from the objects on which these sovereignties operate remaining unchanged, they cannot exist without change. While the

[1] *Infra*, §§ 588, 595, *et seq.*

[2] *Infra*, §§ 373, 380, 596.

Alleghenies, the Mississippi, and the Rocky Mountains, to recur to the analogy already given, remain unchanged, the valleys which they divide give each day new exhibitions of human activity, of energy, of endurance, and of inventiveness; and so while the people of the states, the states themselves, and the government of the United States, are fixed in limits which are perpetual and unsurmountable, there are no limits, within the departments assigned to them, to be placed on the development of their distinctive powers. It is this union of imperialism in the application of power in all matters not encroaching on human freedom, with limitation of power in all matters in which human freedom is concerned, which it is the object of the following pages in part to illustrate. And it is through the application of these two principles, constancy in the distribution of sovereignty, evolution in its exercise, that the meaning of our laws, whether constitutional or statutory, can best be sought.

For aid in the preparation of the Table of Cases and in the correction of proof, I am indebted to my nephew, Thomas I. Wharton, Esq., of the Philadelphia Bar.

F. W.

PHILADELPHIA,
February 15, 1884.

CONTENTS.

CHAPTER I.

NATURE AND CLASSIFICATION OF LAW, § 1.

CHAPTER II.

THEORIES AS TO SOURCE OF LAW, § 42.

CHAPTER III.

HISTORY OF ENGLISH AND AMERICAN LAW, § 66.

CHAPTER IV.

PUBLIC INTERNATIONAL LAW.

I. Object and nature, § 118.
II. History, § 124.
III. Independent sovereignty; its inviolability and incidents, § 135.
IV. Acquisition of territory, § 151.
V. Treaties, § 155.
VI. Diplomatic and consular agents, § 163.
VII. Intervention, § 174.
VIII. Naturalized and other residents; slaves, § 177.
IX. Right to sea and river, § 185.
X. Right of search and condemnation, § 194.
XI. Piracy and privateering, § 200.
XII. Pacific remedies for wrongs, § 203.
XIII. War and its incidents, § 209.
XIV. Contraband, § 226.
XV. Blockade, § 233.
XVI. Rights of neutrals, § 238.

CHAPTER V.

PRIVATE INTERNATIONAL LAW.

I. General Rules, § 252.
II. Domicil, § 254.
III. Personal status, § 261.
IV. Marriage, § 271.
V. Divorce, § 278.
VI. Parental relations, § 288.
VII. Guardianship, § 295.
VIII. Law of things, 298.
IX. Contracts, § 314.
X. Torts, § 337.
XI. Succession, wills, and administration, § 338.
XII. Business forms, § 342.
XIII. Jurisdiction of courts, § 343.
XIV. Evidence, § 345.
XV. Lis Pendens, 349.
XVI. Criminal jurisdiction, 350.

CHAPTER VI.

CONSTITUTIONAL LAW.

I. Preliminary considerations, § 359.
II. Principles of construction, § 368.
III. Relations of departments of government, § 388.
IV. Taxation, § 404.
V. Regulation of commerce, § 418.
VI. Naturalization, § 431.
VII. Bankruptcy, § 439.
VIII. Money and bills of credit, § 442.
IX. Postal service, § 446.
X. Copyrights and patents, § 450.
XI. Piracies and felonies, § 452.
XII. War, § 454.
XIII. District of Columbia, ceded places, and territories, § 461.
XIV. Treason, § 467.
XV. Incidental powers, § 468.
XVI. Bills of attainder, § 471.
XVII. Ex post facto and retrospective laws, § 472.

XVIII. Laws impairing the obligation of contracts, § 477.
XIX. Powers of executive, § 502.
XX. Powers of judiciary, § 516.
XXI. States as parties, § 530.
XXII. Habeas corpus, § 535.
XXIII. Reciprocal rights, etc., § 538.
XXIV. Guaranty of republican institutions, § 549.
XXV. Religious tests, § 553.
XXVI. Freedom of speech, of petition, and of bearing arms, § 555.
XXVII. Unreasonable searches, and general warrants, § 560.
XXVIII. Safeguards of liberty and property, § 561.
XXIX. Reconstruction and civil rights, § 584.

CHAPTER VII.

STATUTORY LAW, § 598.

CORRECTIONS.

Page 78, 5th line of analysis, *for* "Scotius," *read* "Grotius."
" 92, 3d line from top, *for* "1804," *read* "1790–91."
" 107, 20th line of analysis, *for* "Hingham," *read* "Hengham."
" 118, 16th line from top, *for* "Edward IV. (1272–1307)," *read* "Edward I., (1303–1307)."
" 129, 3d line from end of text, *erase* "authorities."
" 134, 21st line from top, *erase* "had reached a perfection."
" 137, 10th line from end of text, *for* "1872," *read* "1772."
" 313, 2d note, *for* "The Amy Green," *read* "The Ann Green."
" 316, 2d line of first column of note, *for* "8 Howard," *read* "11 Howard, 47."
" 499, 3d line from end of second column of note, *for* "73 Mo. 39," *read* "102 Ill. 560."
" 503, 4th line of second column of note, *for* "Sup. Ct. Iowa," *read* "59 Iowa, 148."
" 511, 3d note, last citation, *for* "73 Mo. 30," *read* "102 Ill. 560."
" 544, 1st line from top, *insert* "on application of the defendant."
" 625, 6th note, *for* "Sup. Ct. Mich., *read* "47 Mich. 481."

COMMENTARIES ON LAW.

CHAPTER I.

NATURE AND CLASSIFICATION OF LAW.

Term "law" to be restricted to the juridical government of man, § 1.

Law is based on express command or established rule, but not necessarily by a sovereign, § 2.

As to scope, law may be international, federal, state, or municipal, § 3.

Object of law is distribution of justice, § 4.

Exceptions in cases of self-protection, § 5.

Schools of jurisprudence may be classified as "analytical," "theocratic," "ethical" and "historical," § 6.

Legal right is the right to control another, § 7.

To a legal right it is essential that there should be a party privileged, a party bound, and a thing to be done, § 8.

Inappropriateness of term "rights of things," § 9.

Law a condition of liberty, § 10.

"Sanction" is the detriment imposed on disobedience, § 11.

Distinction between written and unwritten law illusory, § 12.

Statutory law is law imposed in fixed words, § 13.

Custom is the first stage in the formation of law, § 14.

Custom makes law, not law custom, § 15.

Common law the product of right reason based on national conscience and need, § 16.

Not essential to common law that it should have existed time out of mind, § 17.

British Constitution emanating from national conditions, § 18.

So as to Constitution of the United States, § 19.

Unconscious change of institutions illustrated by slavery, § 20.

Paper law giving way to instinctive and customary law, § 21.

Law made to bend to national conditions, § 22.

Illustrated in Pennsylvania, § 23.

Illustrated in Massachusetts, Rhode Island, and Louisiana, § 24.

Illustrated in other states, § 25.

That a sanctioning sovereign is not essential shown by law of nations, inter-state, and Indian law, § 26.

Laws not declaratory are inoperative, § 27.

This position does not involve unchecked democracy, § 28.

No case bound by exact precedent, § 29.

1

Necessary logical evolution by courts, § 30.
This not necessarily arbitrary, § 31.
Nor is such law *ex post facto*, § 32.
Evolution not antagonistic to free-will or theism, § 33.
Process does not preclude occasional receding and revision, § 34.
"Prevalence of equity" in like manner "evolved," § 35.
Admiralty law is the law of the sea, § 36.
Martial law is the law by which an army is governed, § 37.
Military law is the law applied by a military commander to the territory occupied by him, § 38.

§ 1. THE term "law" is frequently applied not only to the principles of human government, but to the order of nature and to the processes of the human mind. This large use of the term has been productive of many ambiguities. The term "law" is used in one premiss, for instance, in its larger sense, and in the other premiss in its more narrow and correct sense, and thus a false conclusion is reached. Thus we have frequently presented to us an argument which may be thus expanded into a syllogism: "It is a law that all acts of an intelligent agent were intended. *This* was the act of an intelligent agent: therefore it was intended." The fallacy in the syllogism here proposed is that "law" in the major premiss is a law of psychology, and that at the best it justifies only a probable conclusion, while the conclusion given is announced as an absolute law of jurisprudence. To this fallacy are attributable the erroneous rulings of our courts that it is a presumption of law that all acts done were intended. Difficulties almost equally great have arisen from the habit of speaking of the sequences of nature as "laws;" it being assumed that there is a law of nature to a particular effect; *e. g.*, that words cannot be instantaneously conveyed from point to point; and then this "law" is spoken of as if it bound absolutely and peremptorily as a law of jurisprudence. As is said by Mr. Christian in a note to Blackstone, "when law is applied to any *other* object than man, it ceases to contain two of its essential ingredient ideas, namely, disobedience and punishment." And we may go further than this, and say, that in the view of jurisprudence law must not only be applied to man as an object, but it must be directed to the government of man. Hence, an inference of psychology, however sound, is not a *law* in the sense before us. To law, freedom of the party gov-

Term "law" is to be restricted to the juridical government of man.

there should be two parties—one to whom the right accrues, and one from whom the duty proceeds. It is here that we are met by an ambiguity of terms, which has been productive of some confusion. Sometimes we are told of the "obligor" and the "obligee" of a right; and this would, perhaps, be the most satisfactory way of expressing the relationship, were it not that in English law "obligor" and "obligee" are terms confined to the parties to bonds. By others, the parties to a right are described as the "person entitled" and the "person obliged;" while a recent thoughtful writer has substituted for these terms, "the person of inherence," as the person to whom the right attaches, and "the person of incidence," as the person on whom the duty is imposed. "A testator," so is this illustrated, "leaves his daughter a silver teapot. Here the daughter is the 'person of inherence,' *i. e.*, in whom the right resides; the teapot is the 'object' of the right; the delivery to her of the teapot is the 'act' to which her right entitles her; and the executor is the 'person of incidence,' *i. e.*, the person against whom her right is available."[1] This phraseology may be objected to on the ground of novelty if not of obscurity; and perhaps it is wisest to fall back on the old terms, "person privileged" and "person bound," as indicating the party by whom a right is possessed, and the party on whom the correlative duty is imposed. Nor does it seem necessary to divide the relationship between the parties into "the object" and "the act or forbearance." That relationship, as in some cases of service, may consist exclusively of action, there being no predetermined object. Hence, in our analysis of a right, we may regard it as composed of three incidents: 1st, the party privileged; 2d, the party bound; and 3d, the duty to be performed.[2]

To a legal right, it is essential that there should be a party privileged, a party bound, and a thing to be done.

[1] Holland, Jurisprudence, 2 ed. 70.

[2] Savigny speaks of rights as being either subjective, when viewed in connection with the person wielding them, or as objective, when viewed in connection with the person bound by them. Rights are also substantive, *i. e.*, claims held by one person on another; or adjective, *i. e.*, ways in which such claims are to be enforced. Professor Holland uses in place of "substantive" and "adjective," "antecedent" and "remedial."

§ 9. From what has been said, we are led to notice the inappropriateness of the term "rights of things," and consequently of the division of rights, as proposed by Hale and Blackstone, into (1) "rights of persons," and (2), "rights of things." In the Roman law, "jus quod ad personas pertinet," was contracted into "jus personarum;" but, as has been lately pointed out, "jus rerum" was never adopted as a contraction of "jus quod ad res pertinet."[1] Consequently, the Roman classification may be paraphrased as "rights of persons exclusively in their relations to each other," and "rights of persons in relation to things." For, as far as concerns law as a rule of action, things have no rights unless as related to persons; and, consequently, there is no category of "rights of things" as distinguished from "rights of persons." Even in proceedings *in rem*, in which a thing is the ostensible object, there is a determinate person, who is the plaintiff, and an indeterminate person, the owner in whole or in part, who, though not specified in the process, is barred by a decree of condemnation. By following the Roman division as above paraphrased, we avoid not only the erroneous classification of Blackstone, but the obscurity with which *status* is defined by Austin. That eminent jurist tells us that *status*, or condition, must reside in persons as members of a class, must concern them specially, and must give to them a conspicuous character or type. This, however, is too comprehensive, as it would embrace membership in a particular profession or connection with a particular trade. This difficulty, which would make the law of *status* include all other branches of law, is avoided by the distinction above given, which places in one category the rights of persons exclusively in their relations to each other, and in the other category the rights of persons in relation to things. To justify this classification, however, two explanations are necessary. (1) Peculiarities of relative personality to constitute *status*, must not only relate to a class of persons, irrespective of their relation to things, but must be constant and exterior. A type of common irritability of temper, for instance, does

Inappropriateness of term "rights of things."

[1] Holland, Juris. (2d ed.) 100.

erned is essential, and the difference between law in this its correct sense, and the "laws of nature," as they are called, is that the former can be disobeyed and abrogated, while the latter cannot be disobeyed or abrogated, though they may be avoided or counteracted. Juridical laws are therefore commands requiring voluntary acceptance, while natural laws are phenomena exacting involuntary submission. Juridical laws tell what man has to do; natural laws what nature has done. For the purposes, therefore, of this treatise, "law" is defined as a juridical rule of human action, excluding not merely moral law, when there is no distinctively secular sanction to enforce it, but psychological and natural law. "Law," then, being thus limited to a juridical rule of human law binding man in communities, "jurisprudence" may be defined as the science of law; *i. e.*, law in its philosophical relations, viewing it as it relates to other sciences, and to the general principles of right.[1]

§ 2. Accepting the definition of law just given as one which, as far as it goes, obtains general acceptation, we meet, when we proceed to the next step, two diverging paths. By what is called the analytical school of English jurisprudence, led by Bentham and Austin,[2] the following are held to be among the essential incidents of laws: (1) They must be announced as bearing not on a special act retrospectively, but on general classes of acts prospectively. (2) They must issue from a sovereign. This sovereign may act either directly by his own immediate agents executing his will, or through local governments established by himself; but

Law is based on express command or established order; but imposition by a sovereign not necessary.

[1] *Infra*, § 10. An eminent contemporaneous writer makes jurisprudence to mean, not any particular concrete form of law, but the science of the general principles underlying all forms of law. See Holland's Jurisprudence, chap. i. But this limitation is far from being generally accepted, jurisprudence being used by many high authorities as meaning the law bearing on some particular line of cases: *e. g.*, medical jurisprudence, criminal jurisprudence, the jurisprudence of torts, etc. Viewing the term, however, derivatively, we may be justified in defining it, as in the text, as the science of law, *i. e.*, law viewed philosophically and in its relations to other science. "Comparative jurisprudence" would unquestionably bear the meaning assigned by Professor Holland to jurisprudence generally.

[2] See, for a fuller notice of this school, *infra*, §§ 6, 22, 90, 91.

without a sovereign, from whom it proceeds either directly or indirectly, so we are told by this particular school of jurists, there can be no law. (3) There must be a command or prohibition. Mere advice cannot constitute a law. (4) There must be some sort of a penalty, as otherwise the announcement would be merely advisory. But the penalty need not be a punishment. It may consist of forcible interference to prevent a forbidden act.

It is as to the second and third of these conditions—those which make a sovereign essential to the imposition and enforcement of a law—that there exists a radical difference of opinion which will be hereafter more fully discussed;[1] the position that law descends from sovereign to people being disputed in various quarters. Law, so it is asserted by eminent authorities, so far from being imposed as a rule by sovereign on people, is imposed as a rule by people on sovereign. Two distinct lines of argument are appealed to as showing that law thus emanates from the people: (1) We must hold this to be the case, so it is said, from what we know of human nature. No laws, such is the maxim constantly invoked, can be better than the people they govern. All laws must be more or less declaratory.[2] The sovereign may be a despot or a democracy, but the laws imposed on the people, so far as they constitute permanent and binding rules, must necessarily be in harmony with the conscience of the people, and respond to the people's needs. (2) History shows that in this way all permanent rules of law take their origin;[3] and there is no settled system of law whose genesis we are able to trace which did not in this way originate. It is so with the common law of England; nor can the fact that this law is based in the main on popular conscience and need be met by the assumption of Austin and Bentham, that acquiescence by the sovereign in a law is tantamount to enactment of the law by the sovereign.[4] It is so in a still more

[1] See *infra*, §§ 93, *et seq.*

[2] *Infra*, § 27.

[3] *Infra*, §§ 14, 22, *et seq.*, 63.

[4] That this acquiescence does not make a law is shown by the fact that the courts when affirming the binding character of a custom declare that the custom makes the law, and was law prior to their decision. *Infra*, § 15.

marked degree, as Sir Henry Maine[1] tells us, in the East, where law is everywhere more or less customary, and where there are some jurisdictions in which the sovereign, though a despot, makes no laws whatever except for taxation, the people being governed in all other matters solely by laws which have grown up among themselves. And it is conspicuously so, as we shall hereafter have occasion to see more fully in detail, in the formation of the distinctive jurisprudences of this country. By whom were existing English statutes winnowed in the colonies of Massachusetts and Pennsylvania,[2] for instance, so as to retain such as suited the temper and met the wants of the people, and to set aside all others? This was not done by the colonial assemblies; had such a process of radical revision been attempted by these assemblies it would have been promptly vetoed by the king in council. It was not done by the British Parliament, though the British Parliament assumed to be the sole supreme legislature by whose laws these colonies were controlled. It was done by popular assent produced by national conscience and national need. It is true that when the colonies became independent sovereigns they passed laws by which the process of selection and rejection thus carried out was approved. But it was never pretended that the process of selection and rejection derived its authority from such legislation. On the contrary, when the colonies became sovereigns, what their courts said was, "this particular English statute was never in force in this state;" in other words, the courts said, "the law of the land, in this respect, was not imposed by the sovereign on the people, but was adopted by the people and afterwards accepted by the sovereign." The same may be said of the rulings of our courts as to international and inter-state law, and the law regulating Indian tribes.[3] From the development of jurisprudence, therefore, in the New World as well as in the Old, we must infer that law is an emanation from the people to the sovereign, and not a command imposed by the sovereign on the people. And it is

[1] See Maine's Ancient Law, 6 *et seq.*; Maine's Village Com. 65; Early Hist. of Institutions, chap. xv.

[2] *Infra*, §§ 23–4.

[3] *Infra*, §§ 26, 265, 434, 585.

interesting to observe that in this conclusion unite not only doctrinaire idealists, as they have been called, such as Jefferson, and shrewd political tacticians, such as Franklin, but philosophical economists, such as Burke,[1] Adam Smith, and Sir George Cornwall Lewis, and conservative traditionalists, such as Savigny and Puchta.[2] It is, in fact, the distinguishing feature of the historical school, of which Savigny is the most able and prominent representative, that by tracing the origin of law to local custom, it makes popular conscience, tradition, and necessity, the basis of law.[3]

[1] *Infra*, § 53.

[2] *Infra*, § 55.

[3] See *infra*, §§ 55–6, 93, for an exposition of the distinctive features of the analytical and historical schools.

That the view in the text is that taken by Judge James Wilson, see *infra*, § 57 *et seq*. As to the analogy between the formation of law and language, see *infra*, § 93.

Mr. Frederick Pollock, after noticing Sir H. Maine's position that there are countries in which there are laws which are not imposed by a sovereign, says: "In the states of society specified by Sir Henry Maine, and to this day prevailing over a large part of the earth, the difficulty is not merely to ascertain what rules of conduct are true laws, but to find any person or body answering the description of a sovereign authority in the sense required by the analytical school." Pollock's Essays, 10. But see *infra*, §§ 24–6.

Bacon, in his argument on the case of the *post nati* of Scotland, has pointed out the vicious circle in which runs the assumption that sovereignty is the basis of law, citing Bracton's maxim, "Lex facit quod ipse sit rex." For full citation see *infra*, § 63. See as to Bacon's views, *infra*, § 86.

The basis of jurisprudence, according to modern Roman jurists, is the existence of an objective law, in subordination to which all litigated questions are to be determined. To this law are to be subjected not merely the personal sympathies or animosities of the adjudicating tribunal, but whatever conception it may have of natural equity as distinguished from positive law. The Roman system agrees with our own in the position that it makes no difference whether this objective law which is to be thus supreme is statute law or common law. When a statute law exactly covers the point at issue, then this statute is supreme. When the statute does not exactly cover the point at issue, then we must resort for direction to the common law, to be drawn from the opinions of jurists, from the rulings of courts, and, when this is applicable, from proof of established custom.

1. *Contents.*—According to the Roman jurists, as expounded by Dr. Bruns, in the treatise hereafter referred to, objective law in its full sweep includes whatever juridically affects either the public or the private life of the people who comprise the population of a state. Law, in this sense, therefore, is either public or private, but though the distinction is obvious and necessary the line on which it is to be drawn is the subject of much dispute. By the Roman law, private law "ad singulorum

§ 3. Juridical law (and in this sense "law" will be in future used) may be divided as follows: (1) International, or the law which affects civilized nations in their dealings with each other; (2) Federal, or the law which governs within its prescribed limits two or more states bound together by constitution or treaty;

As to scope, law may be international, federal, state, or municipal.

utilitatem spectat;" public law "ad statum respublicæ:" but this division, though of great value, is far from being exhaustive. No doubt a suit between A. and B., on a contract, or even on a tort, falls under the head of private law, and no doubt an international litigation falls under the head of public law. Modern Roman jurists distinguish further by holding that to public law belong not merely questions as to public affairs, but questions as to such private affairs as involve the protection of public interests. In this view, in which some of our own leading legal writers coincide, criminal law falls under the head of public. And yet there are several classes of criminal prosecutions (*e. g.*, prosecutions for cheats) which on principle fall no more under the head of public law than do private suits for cheats.

It is important, however, to observe, notwithstanding this supposed subjection of every case to a predetermined objective law, that law is endowed by judges acting under the Roman system with greater laxity than is the case with our own. This may be only a superficial difference, arising from the fact that the judges of courts of first instance under the modern Roman practice arrogate to themselves a liberty only assumed by our own courts of appeal. But be this as it may, Roman jurists hold that in deciding each case the following conditions are to be taken into consideration:—

(*a*) *Æquitas* or fairness, which is defined to be the principle of substantial legal equality. The rule is, equal should be treated as equal. There should be no judicial distinction taken that is not based on an essential inherent distinction; no unequal privileges should be given; every essential inherent distinction, however, requires a corresponding distinctive application of the law.

(*b*) *Morality.*—Law and morals are to be distinguished in the fact that there are many legal acts which are immoral (*e. g.*, unkindness, many sexual offences), while many acts not immoral are indictable (*e. g.*, police offences purely formal). Yet, in some respects, the law takes morality into account. No grossly immoral agreement will be enforced; most grossly immoral acts are punishable as nuisances.

(*c*) *Public welfare.*—The law (*e. g.*, its application in issues raised by *bonâ fide* applicants) is not to be affected by considerations of public welfare. The settled rule is, fiat justitia, pereat mundus. But nevertheless no agreements against public policy are valid, and any overt attacks on public welfare may be punishable.

It must be remembered that in the Roman law, as well as in our own, few general rules of law are applicable to all classes without exception. The distinction is indicated in the Roman law by the words *jus commune* and *jus singulare*. The latter is also spoken of as *privilegium;* a term originally applied to a single person, and afterwards to a class. See Dr. Bruns's essay in Holtzenderff's Ency., 4th ed. 317 *et seq.*, to which I am indebted for several of the above points.

(3) State, or the law which governs a particular sovereignty, subject in federal systems to the superior authority of the federal government in all matters reserved to that government; (4) Municipal,[1] or the law which governs a county, town, or city.

Object of law is distribution of justice.

§ 4. The object of law, so far as concerns the punishment of wrong, is primarily retribution. It is true that reform and example are important incidental objects of punishment; but as an unjust punishment neither reforms the offender nor inspires respect for the law in others, punishment to be effective in these respects must be just—*i. e.*, it must be proportioned to the offence after conviction on a fair trial.[2] In some criminal prosecutions the redress of injuries is also an incidental object—*e. g.*, it being part of the sentence in larceny that the goods stolen should be restored. Criminal prosecutions also may, in rare instances, be resorted to for the securing of rights, as is the case with certain prosecutions for nuisance, and with prosecutions for forcible entry and detainer. But, as a rule, the redressing of injuries and securing of rights is effected by civil suits. Whenever an injury is inflicted (with the exception immediately to be noticed) the courts are open for its redress, and a remedy provided by which that redress can be obtained. The same rule applies to the securing of rights. Whosoever is by law entitled to a right may sue for such right at law.

Exception in cases of self-protection.

§ 5. It has been just said that to the rule that suit may be brought to redress wrongs and to secure rights there is an important exception. That exception is based on the principle that whatever men can do best for themselves ought not to be done for them by the state. It is, for instance, of great moment to the inhabitants of a city that the families who inhabit it should be daily supplied with milk. No law adopted by a legislature, however, could so effectively cause milk to be duly distributed every morning as can private enterprise; nor can the harm done to

[1] "Municipal" law is often used in a more general sense as the law affecting a nation as distinguished from international law.

[2] See this topic fully discussed in Whart. Crim. Law, 8th ed., chap. i.

consumers by want of milk be redressed by any rational system of law, unless they protect themselves by a bargain. The cutting off of a free course of air, also, or the shutting off of a particular view by the erection of neighboring buildings, may be a great injury to the owner of a particular building, but, unless he has protected himself by covenants, he has no redress for such damage, since the disposition of buildings is a matter which the state cannot wisely take out of the hands of individuals and arrogate to itself. I may be greatly injured by what may be the reckless competition of others in business, yet to suppress such competition by force of law, and to limit particular trades to particular persons, is now agreed to be contrary to sound public economy, it being wiser that such questions should be settled by the parties themselves than by the state. So with regard to the right of self-defence. An assailed party may without legal liability take the life of his assailant when this is necessary to protect his own. But we are not to limit the right of self-defence to such extreme cases. There are innumerable instances of repulsion of interference from others, about which it would be so absurd to go to law that the party interfered with uniformly removes the interference by his own action. I am passing through a crowded street on some lawful errand. If it were necessary, in order to obtain the removal of all interfering obstacles, to appeal to the courts, I should be obliged to apply to the courts to move successively out of the way every one of the passengers who in turn obstructs my path. I do not do this, but thread my way through the crowd as well as I can. Or, in walking the pavement I find a stone in the way. I do not institute a prosecution for nuisance in order to compel its removal, but if I choose I push it aside. The water I drink may contain deleterious matter. I do not institute a prosecution to have the river from which it comes purified, but apply a filter in my own house. The fact is, the law in the great majority of cases where rights are invaded leaves redress to the individuals affected. And of many cases of very slight injuries it declines to take cognizance on the ground, it is sometimes said, of the littleness of the hurt, but more properly for the reason of the general principles now before us, that the state will not under-

take to do that which can be best done by private energy and private caution. This exception extends over all the relations of life, and may be classified as follows:—

(1) The right of self-defence noticed above.

(2) The right of abating nuisances, also above noticed.

(3) The right of a landlord to distrain for rent.

(4) The right to seize and impound trespassing cattle.

(5) The right to enter land by a lawful but dispossessed owner.

(6) The right of recaption or reprisal of goods of which the owner has been wrongfully deprived, which right extends to the recaption of wife or children when detained by another.[1]

(7) The right to repel a libel by a counter-publication instead of by a resort to a suit at law.[2]

§ 6. The leading schools of jurisprudence may be classified as follows:—

Schools of jurisprudence may be classified

I. *Analytical*, which is the term applied in England to the school of which Bentham and Austin are the chief representatives.[3] Of these eminent men more detailed accounts will be hereafter given.[4] It is suf-

[1] Blackstone, Book III. ch. i.

[2] That a nuisance may be abated by private persons, provided this can be done without riot, see Penruddock's Case, 5 Rep. 100; Jones *v.* Williams, 11 M. & W. 176; Adams *v.* Barney, 25 Vt. 225; Harvard College, *v.* Stearns, 15 Gray, 1; Rung *v.* Shoneberger, 2 Watts, 23; and see Wood on Nuisance, § 844; 28 Alb. L. J. 244. So a treasurer of a county court has been held justified in breaking open the office of the registrar of that court, during the absence of the registrar and his deputies, the papers in the office being needed for auditing. Burridge *v.* Nicholetts, 6 H. & N. 383. That goods taken from the owner by force or fraud may be forcibly recaptured by him, see Blades *v.* Higgs, 11 H. L. Cas. 621.

The law, says Mr. Broom (Phil. of Law, 20), allows the commission of an assault in such a case, because the remedy by action would be dilatory, tedious, and perhaps inadequate.

That the mayor of a city may demolish a wooden dwelling-house in the city that is likely to injure the neighborhood both by the combustible nature of its materials and the disorderly character of its inhabitants, see Fields *v.* Stokley, 99 Penn. St. 306.

The subject of the necessary limitation of legislation is discussed in a future section. *Infra*, § 27.

[3] The term "analytical" is applied to this school by Sir H. Maine, Prof. Holland, and Mr. F. Pollock, as a title already generally accepted. Why this title should be thus distinctively given it is hard to see, since by other schools, *i. e.*, that of Hegel, law is analyzed with at least equal logical acuteness.

[4] *Infra*, §§ 90 *et seq.*

ficient here to say that the distinctive features of their system are as follows: 1st. The assertion that it is essential to the conception of law that it should be imposed and enforced by a sovereign; a position whose universality of application is, as is seen elsewhere, open to grave objection.[1] 2d. The adoption of utility as the object to effect which laws should be framed, and in reference to which they should be construed; a theory also elsewhere distinctively considered.[2] 3d. The advocacy of a code as a final settlement of law. In this respect the "analytical" school comes in conflict with the "historical" to be hereafter noticed; the analytical school assuming that law is susceptible of being reduced to such a finality, the historical school assuming that it is in a state of continued development and growth in harmony with the development and growth of the community from which it emanates.[3]

as "analytical," "theocratic," "ethical," and "historical."

II. *Theocratic.*—This is in some respects a cross division with the last; Austin, who was a leader in the analytical school, making *jure divino* claims for utilitarianism.[4] But, however this may be, the theocratic school may be divided as follows: (1) those who hold that what natural religion teaches is *jure divino* obligatory, and under this head may be classed those utilitarians who hold that whatever is in the long run most useful must be divinely ordered. (2) Those who hold that conscience is a divine monitor, which view will be noticed hereafter. (3) Those who hold to a system of absolute law imposed by a Supreme Being, or, which in this respect is the same thing, of a Supreme Being imposed by absolute law. (4) Those who hold that the Bible is an absolute rule of government in matters secular as well as matters spiritual. This was the position taken by the extreme Puritans, and to subvert this position Hooker's great work was framed.

Two points were taken in the reply of this illustrious thinker, points equally fatal to any system of absolute law. (*a*) Reason and revelation, he maintained, including in revelation what-

[1] *Supra*, § 2. *Infra*, §§ 22–5.
[2] *Infra*, §§ 95 *et seq.*
[3] *Infra*, § 114.
[4] *Infra*, §§ 93, 98.

ever law claims *jure divino* sanction, have co-ordinate authority; reason has to verify the credentials of revelation, then to define its meaning, then to determine its applicability. (*b*) Whatever concerns man in his mutable relations must of itself be mutable; the boat tosses with the wave on which it reposes, the plaster takes the mould of the face on which it is impressed.[1]

III. *Ethical*, or the school which makes the moral sense the basis of law. Here again we have two distinct classes to notice: (1) Those who assign supreme authority to the individual conscience; (2) Those who collect a general conscience or system of right and wrong from an examination of the community as a whole.[2] The basis of law, in this sense, is the sense of right and wrong prevalent in the community; and in this aspect those who hold to this view harmonize with one section of the adherents of the historical school, to be next noticed. But the representatives of the ethical school go further, and insist that the object of law is not the enforcement of what is useful as distinguished from right, but the enforcement of what is right as distinguished from what is useful. And this coincides with the position already taken, that the object of punishment is retribution; the object of litigation is the maintenance of right.[3] "Wrong," said Hegel, "is a negation of right; punishment is a negation of wrong and hence a restoration of right," or, as Kant puts it, there may be gathered from the nature of things, aside from revelation, a general system of ethics which it is the duty of the sovereign, under proper limitations, to enforce.[4]

IV. *Historical.*—This school, also, falls into two divisions:

[1] See more fully *infra*, § 85.

[2] For an exposition of this view may be consulted Lorimer's Principles of Jurisprudence; a work of great merit and interest, published in Edinburgh in 1880. And see *infra*, § 60.

[3] *Supra*, § 4.

[4] This view is maintained by President Woolsey, Political Science, §§ 100 *et seq.*—"In every punishment, as such, there must be first justice, and this constitutes the essence of the notion. Benevolence may, indeed, be united with it, but the man who has deserved punishment has not the least reason to reckon on this." Kant's Practical Reason, Abbot's Trans. p. 177, and see *supra*, § 4.

(1) Conservative, of whom Blackstone is the chief representative, holding that the common law is the perfect embodiment of wisdom, and has existed as such from times immemorial, and that it should be forever preserved as it is. That the position of this class of jurists in respect to the common law is based on a mistake is elsewhere seen;[1] and aside from this, the fallacy of the position is shown from the fact that the period of common law perfection shifts with the era of the particular eulogist. (2) Progressive, holding that the law of a nation is the product of its conscience and need at each particular era. The leading positions relied on by this school will be hereafter considered.[2] It is sufficient to say at this point that viewing conscience, not as an insulated moral sense, intuitive or inspired, but as the moral sense of the nation, modified by reason and hereditary and traditional tendencies,[3] the progressive historical and ethical schools coincide.[4]

§ 7. We are frequently told of "rights of persons," and of

[1] *Infra*, §§ 14 *et seq.*

[2] *Infra*, §§ 14 *et seq.*, 53 *et seq.*

[3] *Infra*, § 60.

[4] "The historical method," says Mr. F. Pollock, in an inaugural lecture at Oxford, in 1883, "is not the peculiar property of jurisprudence. . . . The doctrine of evolution is nothing else than the historical method applied to the facts of nature; the historical method is nothing else than the doctrine of evolution applied to human societies and institutions. . . . Savigny, whom we do not yet know or honor enough, and even our own Burke, whom we know and honor, but cannot honor too much, were Darwinians before Darwin." See *infra*, §§ 33, 55. As will be hereafter seen (*infra* §§ 33, 86), Mr. Pollock might have gone further back than Burke, and shown that by Hooker the power of "environments," in the silent modifications of law is recognized as fully as it is by Burke.

In a work published by Mr. John M. Lightwood, in 1883, entitled, "The Nature of Positive Law" (Macmillan & Co., London), the characteristics of the historical and analytical school are set forth with much fulness and skill. The general position is that of Savigny, that law is not set by a sovereign to a subject, but emanates spontaneously from the people. Such law is at once prompted and guarded by the popular conscience, and is therefore a rule of conduct not imposed of right, but accepted as right. Scientific law, as it is called by Mr. Lightwood, comprises legislation, judge-made and jurist-made law, and is simply an expression of the common popular will. On this, however, Ihering has grafted a qualification which is accepted by Mr. Lightwood, viz., that in its origin even customary law is based on force—*e. g.*, the force of one able to compel obedience—but that it does not become settled customary law until the sense of this force passes away.

Legal right is the right to control another.

"rights of things," as if the two were distinguishable, and as if a thing which is in itself unconscious and incapable of volition could have rights. So far, however, as concerns jurisprudence, the only rights cognizable, as will presently be seen, are the rights of persons; and so far as concerns persons, unless such rights can be enforced, they are not within the sphere of law in the sense in which the term is used in the present treatise. Hence the proper definition of a legal right is a right to control the action of others.[1] It is not necessary that the control should be enforceable primarily by judicial process. A father has a right to control a child, for instance, though the right is one in the exercise of which in many cases the courts give him no aid.[2] Control, in the sense before us, therefore, is of two kinds: 1st, that which the law gives process to effect; 2d, that which the law permits and refuses to arrest, though ready if necessary to modify.[3] Viewing legal right in this sense, it is distinguishable from might, which is capacity to compel without rightfulness, and from a merely moral right, in which there is rightfulness without capacity to compel. The distinction between moral and legal right is sometimes faint, yet its existence cannot be avoided. It is essential that the law of the land should specify what acts do and what acts do not impose an obligation; and the line drawn in both the Roman and the English common law, that the acceptance of a benefit does not involve a promise to pay for it, is founded on sound principle. It is true there are many cases in which we say that kindness received ought to be met by kindness returned. But it is obvious that business could not be safely conducted, if parties were to be made liable for debts which they did not contract in terms which both parties at the time regarded as creating indebtedness.[4] If kindness were made compulsory, it would cease to be kindness.

§ 8. To a legal right, it is essential, in the first place, that

[1] Kant's definition is to the same effect: "Die Befügniss zu zwingen," Rechtslehre Werke, vii. s. 29.

[2] *Infra*, § 11.

[3] See *supra*, 5.

[4] See discussion in Whart. on Cont., §§ 784 *et seq.*

Legal right is the right to control another.

"rights of things," as if the two were distinguishable, and as if a thing which is in itself unconscious and incapable of volition could have rights. So far, however, as concerns jurisprudence, the only rights cognizable, as will presently be seen, are the rights of persons; and so far as concerns persons, unless such rights can be enforced, they are not within the sphere of law in the sense in which the term is used in the present treatise. Hence the proper definition of a legal right is a right to control the action of others.[1] It is not necessary that the control should be enforceable primarily by judicial process. A father has a right to control a child, for instance, though the right is one in the exercise of which in many cases the courts give him no aid.[2] Control, in the sense before us, therefore, is of two kinds: 1st, that which the law gives process to effect; 2d, that which the law permits and refuses to arrest, though ready if necessary to modify.[3] Viewing legal right in this sense, it is distinguishable from might, which is capacity to compel without rightfulness, and from a merely moral right, in which there is rightfulness without capacity to compel. The distinction between moral and legal right is sometimes faint, yet its existence cannot be avoided. It is essential that the law of the land should specify what acts do and what acts do not impose an obligation; and the line drawn in both the Roman and the English common law, that the acceptance of a benefit does not involve a promise to pay for it, is founded on sound principle. It is true there are many cases in which we say that kindness received ought to be met by kindness returned. But it is obvious that business could not be safely conducted, if parties were to be made liable for debts which they did not contract in terms which both parties at the time regarded as creating indebtedness.[4] If kindness were made compulsory, it would cease to be kindness.

§ 8. To a legal right, it is essential, in the first place, that

[1] Kant's definition is to the same effect: "Die Befügniss zu zwingen," Rechtslehre Werke, vii. s. 29.

[2] *Infra*, § 11.

[3] See *supra*, 5.

[4] See discussion in Whart. on Cont., §§ 784 *et seq.*

not constitute a *status*. (2) The "things," relationship to which forms a distinct category, are things incorporeal as well as things corporeal, including, therefore, services which do not concern that which is tangible and material, as well as services almost exclusively relating to that which is tangible and material.

§ 10. The term law, as we have seen, is used in two senses: first as an order, and secondly as a rule. As an order, it denotes the sequences of the material universe. As a rule, it denotes the principles by which a community is governed. According to Kant, law, in this sense, is a summary of the conditions under which the wills of individuals are harmonized in a system of freedom.[1] So far from law being, as is sometimes declared to be the case, the contradictory opposite of liberty, it is a condition without which liberty cannot exist. If the lawlessness of others be not restrained, the liberty of enjoyment of property and of personal security must cease to exist. There can be no liberty in the enjoyment of rights unless there be a law for the prevention of wrongs.[2]

Law a condition of liberty.

§ 11. "Sanction" is often treated as convertible with penalty, and no doubt this is correct in respect to criminal procedure. In civil procedure, however, the term has a much wider signification. A liability to be enjoined from doing a forbidden act, for instance, is a sanction, and so is a liability to pay damages for a forbidden act when done. In fact, whenever a party is subjected by law to a detriment of any kind for doing or attempting a forbidden thing, such detriment is the sanction of the law by which the thing is forbid-

"Sanction" is the detriment imposed on a party for disobedience.

[1] Rechtslehre, Werke, vii. p. 273.

[2] See on this topic Holland, Jur. 2d edition, 58. Prof. Holland quotes, in addition to Kant's definition above given, that of Locke, to the effect that "the end of the law is, not to abolish or restrain, but to preserve or enlarge freedom." Locke, Civil Government, i. 857. To these quotations may be added the following from Burke (Burke's Works, iii. 49, 185): "Liberty must be limited in order to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the constant aim of every wise public council to find out, by cautious experiments and rational cool endeavors, *with how little, not how much, of this restraint, the community can subsist.*"

den. It is objected by Sir H. Maine that the necessity of sanction as an ingredient of law is disproved by the fact that "customary law is not enjoined by a sanction;" and he goes on to state, by way of illustration, that "in the almost inconceivable case of disobedience to the award of the village council, the sole punishment, or the sole certain punishment, would appear to be universal disapprobation. And hence, under the system of Bentham and Austin, the customary law of India would have to be called morality, an inversion of language which scarcely requires to be formally protested against."[1] If the statement, "customary law is not enjoined by a sanction," is used in a general sense it cannot be sustained, since there are innumerable cases in this country in which fine and imprisonment have been assigned as a punishment on conviction on indictment at common law for offences, *e. g.*, malicious mischief, which are the mere creatures of custom. And even if the statement be restricted to India, it does not disprove the position that a sanction is essential to a law. "Universal disapprobation" is not a less severe punishment than the infamy which has always been regarded as so heavy an ingredient of discipline in the English common law.

Distinction between written and unwritten law illusory.

§ 12. The distinction sometimes made between written and unwritten law is open to grave exception. There is no case litigated, no matter how novel it may appear, that does not depend more or less upon written law; there is no case litigated, no matter how express may be the statute determining it, which does not depend more or less upon unwritten law. Cases of the first impression, as they are called, appeal to a far wider range of written authorities than do cases less novel; and on the other hand, there is no statute nor no decision, no matter how direct and precise, that does not require an appeal to unwritten law for its interpretation. In fact the more pointed and exact a statute or decision is, the more subtle and refined are the distinctions to which it gives rise. The statute of frauds, for instance, was drawn with great skill and care; yet there is scarcely a word in the statute that has not been productive of

[1] Maine's Village Com. 68.

innumerable adjudications, each one of these adjudications presenting *differentia* which become the topics of new litigation.[1] Recently it has been the custom to incorporate in statutes clauses defining their terms; yet there is no one of these definitions that does not call for a re-definition.[2]

Statutory law is law imposed in fixed words

§ 13. A statute, according to the Roman law, is a specific law imposed by an authority to whom obedience is due. It must be specific, and in this it is distinguishable from common and customary law, which will be presently noticed. It must be imposed by an authority to whom obedience is due. This authority need not, as we have seen, be that of a legislature, nor need it be that of a sovereign executive, whose edicts, according to the Roman law, are statutes. But, in the Roman law, the laws

[1] *Infra*, §§ 30, 114.

[2] We may take as an illustration the "Territorial Waters Jurisdiction Act" (41 and 42 Vict. c. 73), passed by the British Parliament in 1878 for the purpose of settling doubts created by the ruling in R. *v.* Keyn, L. R. 2 Ex. Div. 63, to be hereafter noticed (*inf.* § 186). To the statute are appended the following definitions:—

"'The territorial waters of her Majesty's dominions,' in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of her Majesty's dominions, *as is deemed by international law to be within the territorial* sovereignty of her Majesty." . . . Yet on this very question international law has presented no settled rule: by some high authorities a marine league being given as a limit, and by others, equally high, such a distance as would be protective of the shore, which would be nine miles, the present range of cannon shot. (*Inf.* § 186.) A decision, therefore, of a court having jurisdiction is necessary to settle doubts as to a statute enacted to settle doubts as to a prior decision. Nor would a decision on the statute be final, since it would be impossible to construct such a decision without using terms ambiguous either in themselves or in their application to issues subsequently to arise. The same remark may be made as to a subsequent definition: "Offence, as used in this act, means an act, neglect, or default of such a description as would, if committed within the body of a county in England, *be punishable on indictment according to the law of England for the time being in force.*" But what offences are punishable by indictment in England at any given time? What treatise gives us all these offences exhaustively? And how many fresh commentaries would such treatise require to meet each new case that arose? Milton tells us of an—

"Anarch old
Who by decision more embroiled the fray."

And so it is with all attempts to define. We can define satisfactorily enough for the purpose of deciding any one particular case. But the next case that arises requires a minuter differentiation for the purpose of showing that such case falls or does not fall within the rule previously established.

of a corporation, municipal or private, and the laws of a family, imposed by its head, are statutes; and even in the English law the term is applied to the laws of corporations and schools, as far as concerns those subject to such laws. The test, both in the Roman law and our own, is capacity to exact obedience and formularization in fixed words. There is, however, this distinction, that ordinarily with us laws issued by an executive, no matter how binding, are called ordinances or decrees or proclamations, while in the Roman law they fall under the general head of statutes. A distinction, also, is taken with us between public and private statutes. A public statute is a statute which establishes a general system. A private statute is a statute which is confined to a special case.[1] The practical difference between the two classes is that of a public statute, at common law, the courts take judicial notice, while a private statute must be pleaded and proved. By particular legislation, however, private statutes may be clothed with the incidents of public statutes.

Custom is the first stage in the formation of law.

§ 14. It is possible, as we have seen, to conceive of a law imposed on a people by a sovereign in accordance with his own *a priori* speculations. Such a law, however, would not be permanent in its effects unless it harmonized with the conscience and needs of the people on whom it should be imposed. We may set aside, therefore, as exceptional legislation of this class, and confine our attention to the common law, or to statutes which are the expressions of popular sentiment as to what law should be; and of both common law and statutes of this class custom may be spoken of as the first stage.[2] When or how a particular usage originated, is a question as impossible to answer as the question put by the sophist as to the precise number of grains of sand which constitute a heap; or the precise moment when a path across a common was first laid;[3] or the precise period in which any particular language took its mature shape.[4]

[1] *Infra*, § 598.

[2] *Infra*, § 27. "Customs," says Bacon, "are laws written on living tablets."

[3] See *infra*, § 61.

[4] *Infra*, § 94. "The changes, and improvements of the law," says Judge Strong, of the Supreme Court of the United States, in an address before the Law Department of the University of Pennsylvania in 1879, "have been so gradual *as to be almost imperceptible during their occurrence.* Yet, if any two

§ 15. It has been sometimes said that a custom does not become law until adopted as law by the sovereign either through courts or legislatures, and this view has been sustained by the high authority of Mr. Austin. Such, however, as has been well remarked,[1] is not the case as a matter of fact. The courts do not determine that a custom is to be in force in the future; they decide that when a reasonable custom exists, it governs prior cases in the sphere of its operation.[2] We may recur, as illustrating this position, to the annulling, by common consent, in the colony of Pennsylvania, of such English statutes as were inconsistent with colonial conditions.[3] When the legislature, on

Custom makes law, not law custom.

periods not very remote from each other be contrasted, they will be found to have been exceedingly important." The whole of this excellent paper may be referred to as sustaining the position taken in the text, and in succeeding sections. See *infra*, § 61.

The ground of customary law, so says Dr. Bruns in Holtzendorff's Enc. 1. 397, is not the will of the people to create the law, nor is it the conviction that the law already exists, but it is the popular consciousness that so the law must be. Customary law does not rest on the power of the people over the law, but on the power of the law over the people, But as our own common law yields to statute law, so the Roman customary law is only operative in matters in which statutes leave undetermined, and may be at any time vacated or modified by statute or public policy. Yet customary law is prior in the Roman sense to statute law, and the first statutes that were passed were passed to embody customs. When, however, these customs cease to express the popular will, then, whether or not sanctioned by statute, they are annulled or modified by statute. But by the classical Roman law, customary law when universal, so far approximates to our common law, that in matters in which it does not conflict with statutes, it stands on the same authority with statutes; and it may even, when universal, cause an obsolete statute to become inoperative.

Of the unconscious change of substance under unchanged forms the commissioners of the civil code of Pennsylvania (Messrs. William Rawle, T. I. Wharton, and Joel Jones) thus speak in their second report presented in 1832: "The changing relations, customs, and intelligence of communities, exert an irresistible force in operating a change upon the laws; the change, therefore, is in the substance—the names and theories remain by force equivalent to the force of language." To same effect see views of Herbert Spencer, *infra*, § 106.

In Sir H. Maine's Dissertations on Early Law and Custom (London, 1883), he shows how from the practice instituted by the Norman kings of travelling from place to place to administer justice, the more modern system of circuit riding arose.

[1] Holland, Juris. 48.

[2] Whart. on Ev. § 187.

[3] Mr. Holland gives a similar illustration: "The laws of Draco, says

the formation of the state government, called upon the judges to report what English statutes were in force in the colony; neither judicial report nor legislation repealed the statutes that were declared to be dropped. Custom, without the action of either court or legislature, had annulled them; and all that court and legislature did was to declare that this custom was effective, and that the statutes had ceased to be in force.[1]

Gellius, were repealed, non decreto jussoque, sed tacito illiteratoque consensu."—Holland, Juris. 47.

[1] *Infra*, § 23.

"A single instance makes a precedent, and the precedent tends to confirm itself by repetition. It seems not unlikely that this is the manner in which precedent and custom are originally formed. What has been done once is done again, not because it seems the best thing to do, but because there is an unreasoning tendency to do it, which in the absence of other and stronger motives will prevail."—Pollock's Essays, 1882, p. 54.

Yet that custom makes the law, and not law custom, is shown by the fact, just noticed, that when a custom is recognized by the courts as existing, the recognition operates retrospectively, the custom being regarded as law before it was judicially recognized. And not only are customs created, but they are changed or destroyed by conscience and necessity. They are like buoys placed in a shallow river to mark out the channel. When the channel is discovered, these buoys or other marks are stationed to show where it runs. When the channel shifts, they are shifted. When the channel ceases to exist, then the marks are removed. See *infra*, § 61.

In Lord Selborne's speech, when introducing the judicature bill in the House of Lords in 1873, he said, in reference to the fusion of law and equity:—

"My Lords, it is probably an universal law—certainly it is a general law—concerning all legislative matters of importance in this country, that they depend on the gradual formation of a sound public opinion, founded on experience, and if that is true with regard to any class of measures, it is emphatically true of those measures which relate to improvements or amendments in the law. Time, therefore, is required—and, on the whole, I think it is good that time should be required—to bring opinion on these subjects to the maturity necessary for sound legislation. On this particular subject it has been growing for a considerable number of years. During many years, that opinion has been forming among the most educated and enlightened classes of society in your Lordship's House and in the other House of Parliament, and particularly among those who are most conversant with the administration of justice. This being so, my Lords, unless I encourage in myself too much hope, I venture to think opinion has now reached a point which will enable me to grapple with the great subject."

And further on he said:—

"I think it would be a great mistake to suppose the credit of successful measures, when the time comes at which they can be adopted, belongs to

§ 16. We shall hereafter see that the source of law is reason combined with national conscience and need. Conscience, therefore, as will be shown, is not to be regarded as an insulated moral sense, intuitive or inspired,[1] but as part of a common nature, influenced in a measure by sense of right, in a measure by interest, in a measure by social surroundings and hereditary tendencies, but presided over as a whole by reason, and pervading the community as a body.[2] The conflicting theories as to the way in which the common law was introduced into this country will be considered in a future section.[3]

Common law is product of right reason based on national conscience and need.

§ 17. It is asserted by an author of authority that the common law of England is "of higher antiquity than memory or history can reach."[4] And it is also declared, and in this other eminent writers agree, that it consists in maxims and customs which have existed "time whereof the memory of man runneth not to the contrary;" which, it is said, means that the maxim or custom "must appear (for anything that can be proved to the contrary) to have been in use before the commencement of the reign of Richard the First." "It is this antiquity that gives it its weight and authority; and of

Not essential to common law that it should have existed time out of mind.

those who introduced them. The predecessors of these persons have paved the way for them, and laid the foundations of the superstructure afterwards to be built."

The effect of custom in gradually dropping the feudal element in the common law of Virginia is noticed in Lodge's English Colonies in America, pp. 89 *et seq.*, and Doyle's English Colonies in America, pp. 170 *et seq.*

The customary development of Norman and English law is traced with great elaborateness in Glasson's Histoire du droit et des institutions politiques, civiles, et judiciaires de l'Angleterre, comparés au droit et aux institutions de la France depuis leur origine jusqu'à nos jours. Paris, 1882–3.

"It might be dangerous formally to authorize repeal by desuetude or *non-user*. But it is impossible to underrate that spontaneous concert of action, that imperceptible power by which, without shock or commotion, a people condemns bad laws and protects society against hasty legislation, and, in fact, guards the legislater against himself." Prelim. report to Code Napoleon.

[1] *Infra*, § 60.

[2] That the common law of a country as thus generated is modified by territorial conditions, see *infra*, §§ 22 *et seq.*

[3] *Infra*, § 63.

[4] Stephen's Com. 8th ed. i. 49. Blackstone writes virtually to the same effect.

this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom." But this position cannot be sustained. There is scarcely a maxim or custom of the common law as it existed at the time of Richard I. which, if not modified by statute, has not been modified or abrogated by judicial interpretation; and there is scarcely a maxim or custom now recognized as part of the common law fo England in our own times which is not, in its present exact shape, of an origin comparatively modern. We may give as an illustration the position taken by Lord Coleridge, in 1883, in a case hereafter cited,[1] that Christianity is not a part of the common law of England, and that, consequently, infidel attacks on Christianity and its Founder, unless amounting to a public scandal and nuisance, are not indictable at common law in England. In the days of Richard I. both of these points would have been decided differently; neither of them is specifically determined by statute; and the first of them goes to the very basis on which the common law rests. Another important line of illustration may be drawn from the law with regard to presumptions. So far as we can learn from the scanty records that have come down to us from the reign of Richard I., presumption of intent, of malice, of continuance, of regularity, would have been all held by the judges in those days to have been presumptions of law, to be arbitrarily laid down by the courts; whereas, in submission to the better knowledge of psychological and physical phenomena in our own days, these presumptions are now all regarded as presumptions of fact, or, in other words, as mere inferences to be drawn by the jury from the particular circumstances of the case in litigation. In the days of Richard I., also, writs were sold at arbitrary prices by the king's officials; it was many years before it was settled that writs were to issue as a matter of right.[2] In the days of Richard I., again, jurors were selected because they were supposed as neighbors, if not as witnesses, to know all about the case; in our own day that which would then have been a qualification is now a ground of challenge.

[1] *Infra*, § 22.

[2] Bigelow, Hist. of Proced. in England, 153; Pollock's Essays, 209.

Culpa levissima, also, was held by the old law to impose liability, yet there is no one who now holds that liability is imposed by *culpa levissima*. There is, once more, no more conspicuous or salutary rule, in our present law of evidence, than that which privileges a party from being compelled to answer questions the answers to which might subject him to criminal prosecution. We find, however, that in the reign of Elizabeth parties brought before the star chamber had questions put to them as to their participation in acts alleged to be illegal and treasonable, and on their refusal to answer were committed to prison, where they were detained sometimes for years. Not only was such committal declared to be lawful by the Chief Baron, the two Chief Justices, and the Attorney-General, but the Attorney-General gave an opinion that a refusal to answer was in itself an act of treason.[1]

[1] Stripe's Life of Whitgift, ii. chap. v. *et seq.*

The evolution of the jury system in England, noticed in the text, is detailed in Brunner, Enstehung der Schwurgerichte, Berlin, 1871; Biener, das Englische Geschwornengericht; Forsyth, History of Trial by Jury, London, 1852; Stubbs's Constitutional History, i. 612; and Freeman's Norman Conquest. According to Prof. Stubbs, as adopted by Mr. Freeman, "the Norman system of recognitions, one handed on from Carlovingian times, was the 'instrument which, introduced in its rough simplicity at the Conquest, was developed by the lawyers of the Plantagenet period into the modern trial by jury.'" It is added by Mr. Freeman that "the Norman or Carlovingian institution had its root in the same primitive ideas as the kindred old-English institutions." But so far from our present juries being resuscitations of the old English juries, they are their contradictory opposites. The old English juries were sworn witnesses of the fact summoned to tell about it to the king, who, in person or through his council, entered judgment. Our present juries are sworn arbiters of questions submitted to them on the testimony of witnesses outside of their own body. The old jurors were committees to report on facts; our present juries are tribunals to decide on facts reported to them by others. The old juries were not limited as to number, and all cognizant of a transaction, except those interested in the issue, were summoned; the present jury is summoned by lot, and it is a cause of challenge if any juror has formed a settled opinion on the facts. That which was the essential qualification of the old juror is an absolute disqualification of the juror of our own times. The juror of old times, also, was responsible, and even as late as Charles II., could be subjected to penalties for deciding wrongfully; the juror of our own times, though his action may be revised, and though he may be punished for contempt, or disobedience, or corruption, is irresponsible, so far as the merits of his verdict are concerned. The common law jury of Richard I., therefore, was a totally different insti-

§ 18. If we turn to constitutional law, we observe the operation of the same forces. The British Constitution is the re-

tution from the common law jury of the times of William III. Each, however, was the product of the need and conscience of the times.

From Stubbs' Const. Hist. of Eng., vol. i. ch. xiii., we take the following extracts:—

"The persistence of the inquisitorial system is proved not only by Norman charters and customs, but by the existence of the kindred principle, undeveloped indeed and early forgotten, in the jurisprudence of the rest of France. The order to hold such inquest was a royal, or, in Normandy, a ducal privilege, although it was executed by the ordinary local officers; primarily it was employed to ascertain the rights and interests of the crown; by special favor permission was obtained to use it in the concerns of the churches and of private individuals. Even under this system the sworn recognitors were rather witnesses than judges; they swore to facts within their own knowledge; the magistrate to whom the inquiry was trusted was the inquirer, and he inquired through the oath of men sworn to speak the truth, and selected in consequence of their character and local knowledge.

"Such was the instrument which, introduced in its rough simplicity at the Conquest, was developed by the lawyers of the Plantagenet period into the modern trial by jury. Henry II. expanded and consolidated the system so much that he was not unnaturally regarded as the founder of it in its English character. From being an exceptional favor, it became under his hand a part of the settled law of the land, a resource which was open to every suitor.

"The further change in the character of the jurors, by which they became judges of fact, instead of witnesses, is common to the civil and criminal jury alike. As it became difficult to find juries personally well informed as to the point at issue, the jurors summoned were allowed first to add to their number persons who possessed the requisite knowledge under the title of afforcement.

"After this proceeding had been some time in use, the afforcing jurors were separated from the uninformed jurors, and relieved them altogether from their character of witnesses. The verdict of the jury no longer represented their previous knowledge of the case, but the result of the evidence afforded by the witnesses of fact, the law being declared by the presiding officer in the king's name," pp. 687–694.

Jurors, in the technical sense, went through the following successive stages:—

(1) As *compurgators*. In the oldest extant records of Saxon law, we are told that purgation of homicide may be by the solemn act of the accused "with twelve king's thanes; but if the thane accused be of lower degree, let him purge himself along with eleven of his equals and one king's thane." This was originally a matter of custom. It subsequently became sanctioned by settled legal practice; it being the usage of the sheriff, in all questions in which guilt was charged, to choose twelve "compurgators," to whom twelve were to be added by the accused.

(2) As *recognitors*. Compurgation became obsolete in the reign of Henry II.; and its place was in part taken by the grand assize, consisting of sixteen "recognitors," who were the predecessors of our grand juries. The petit jury

sult of national conscience and sense of need, sometimes working through statute, sometimes without statute. It would be impossible to find any statute which transfers the practical sovereignty of the state from the monarch to the House of Commons; yet that it is so transferred there is no question. The only prerogatives of sovereignty now retained by the monarch are those of choosing a prime minister and dissolving Parliament. But as to the first, the monarch is practically restricted to a choice which may be approved by the House of Commons, and as to the second, it is now agreed that a dissolution can only be ordered under the advice of the minister for the time

British Constitution emanating from national conditions.

came into distinctive operation in the reign of Henry IH., when ordeals ceased to be appealed to. These jurors, like the compurgators, were at first the principal witnesses of the facts of the case. Afterwards the witnesses were summoned with the recognitors, but were merely assessors, advising, but not taking part in the verdict.

(3) As adjudicators of facts proved by witnesses. Before the reign of Edward IV. jurors were sworn "to speak the truth." After that era the oath was "to give a true verdict according to the evidence." Fulton's Const. Hist. 16.

Glasson, in his history of English law, already cited, thus speaks of the gradual development of the jury:— "In point of fact the jury was evolved gradually. This institution did not appear suddenly at any particular epoch. In embryo among the Anglo-Saxons, it developed insensibly, became by degrees subject to fixed rules, and ended by assuming a permanent form. In England the jury was at first regarded as an element of proof, and English jurists, even at the present day, feel the influence of this origin. They speak of the jury in connection with evidence, while French lawyers consider the jury as one of the elements in certain jurisdictions. In ancient English law, and even among the Saxons, the procedure by jury is only a manner of proof which the parties may require, or the judges may officially order in certain cases. During the Anglo-Saxon epoch the most important acts of civil life were performed in the presence of witnesses, and in all cases those which had not been so performed were none the less known by the neighbors. Thus, in case of dispute it was quite natural to call those who had personal knowledge of the affair, in order to elicit information from them. At a later period, the publicity attaching to acts of civil life having partly disappeared, and the administrative system of the tithing, which no longer included all the inhabitants, being relaxed under the influence of feudalism, it became impossible to call neighbors having a personal acquaintance with the facts. It was necessary to rest satisfied with respectable and competent persons. But then by force of circumstances the functions of these persons were altered: they were no longer asked what they knew of the affair, but merely what their opinion was." (Vol. i. pp. 263–4.)

being in power. Cabinets, as has been frequently remarked, are the pure creatures of custom; the only attempt to settle cabinets arbitrarily by statute—that of Sir W. Temple, in the reign of Charles II.—having ignominiously failed. Nor is the office of "prime" or "first" minister created by statute. It is of cardinal importance, since the "prime" minister is, when in office, the real sovereign; it goes, therefore, to the foundation of law as well as of government; but it is the creature, not of statute, but of custom moulded by national conscience and need.

As to Constitution of the United States.

§ 19. The Constitution of the United States has been often spoken of as if it had been speculatively designed by a school of political philosophers. So far from this being the case, however, it is the peculiar merit of that marvellous document that it responded to the conscience and need of the states by whose representatives it was framed.[1] The investing of the Federal government with adequate power, the most distinctive feature of the Constitution, both as originally adopted and as amended, was brought about, not by *doctrinaire* predilections of its framers, but by the conviction of the community that, in the condition of things, it must be so. "The gradual energization of Federal authority," says Judge Cooley, "has been accomplished quite as much by the course of public events, as by the new amendments to the Constitution."[2] The power of Congress, for instance, has been expanded as a matter of necessity so as to apply to specific objects which were not dreamed of by the framers of the Constitution, however strictly such powers, so far as concerns their generic character, are confined within the limits the Constitution prescribes. These powers "keep pace with the progress of the country; and adapt themselves to the new development of times and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and

[1] *Infra*, §§ 360 *et seq.*

[2] Cooley's Const. Law, 39.

wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty of Congress to see that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation."[1] Not only are the powers of Congress thus applied, when necessary, to whatever is within the range of the object intended to be affected, but clauses which practically jar with the general spirit of the instrument, however theoretically consistent they may be, drop into inefficiency. This is the case with the provision requiring the intervention of an electoral college to elect a president, the form of which is retained, while the idea of the supremacy of the college has now given way to that of those by whom the college is elected. The word "advice," also, in the clause "with the advice and consent of the Senate," has lost the meaning intended to be imparted to it and is now merged in "consent." To the logic of facts, also, and not to the logic of textual criticism, is to be assigned that construction of the Constitution which resulted in the annexations of Louisiana, Florida, Texas, and California, which have given the country a sweep of territory which, in extent and variety of produce, no other country in the world can rival.[2] That to similar causes, and not to speculative legislation, is to be imputed the abolition of slavery will be noticed in a subsequent section.[3] And the very language of the Constitution itself responds to the view that it is not a law imposed on the people by the convention, but a law which the convention took from the people. "We, the people of the United States," it begins, "ordain and establish this Constitution." It was the people, many-voiced yet one-voiced; the people demanding at once unity and diversity. The unity itself combined the diversity. To the speculative politician this may appear inexplicable; and speculative politicians, especially in France, looked on the Constitution with sceptical amazement. But to

[1] Pensacola Tel. Co. *v.* Western Tel. Co., 96 U. S. 1, 9.

[2] See *infra*, §§ 305 *et seq.*

[3] *Infra*, § 20.

this there are two replies. In the first place, what the preamble stated was the fact. It was "we, the people," who spoke; and the utterance was one dictated by popular necessity and popular conscience. In the second place, there is nothing strange in the position that a political constitution should combine contradictory opposites, logically irreconcilable, yet practically correlative. It is so in the kindred sciences of theology and metaphysics. Free will and necessity, for instance, are logically contradictory, yet no practical theologian, no practical metaphysician, doubts either. So it is with federal sovereignty and state sovereignty, with the unity of nationality and yet diversity of nationality, of which Mr. Gerry, in a passage elsewhere quoted, spoke, when he said we were at once many nations and one nation. No speculative politician would look upon such a combination as rational; no practical statesman would look upon it as other than necessary. But, be this as it may, it comes to us under the solemn announcement, "We, the people of the United States," "ordain and establish" this Constitution.[1]

Unconscious change of constitutions, illustrated by slavery.

§ 20. Before the Norman conquest a large portion of the English people were held as slaves—*servi*—who were the master's absolute property and subject to be sold by him at his will. The slave was a chattel, entirely destitute of rights. The villein (*villanus*), on the other hand, was usually attached to the soil, and,

[1] According to Mr. Gladstone, "The British Constitution is the most subtile organism which has proceeded from progressive history; so this American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man!" This passage, which is used as a motto by Mr. Bancroft at the beginning of his work on the "History of the Constitution," is nevertheless in conflict with the subsequent narrative of Mr. Bancroft, in which he shows that the Constitution was an emanation of the conditions under which it originated. As is noticed above, the only portion of the Constitution which was purely speculative—that contemplating an independent electoral college to choose the President on its own motion—is the only portion of the Constitution which has turned out to be inoperative.

"But what do we mean by the American Revolution? Do we mean the American war? The revolution was effected before the war commenced. *The revolution was in the minds and hearts of the people;* a change in their religious sentiments, of their duties and obligations." John Adams's Life and Works, x. 283, as quoted in Mr. E. G. Scott's "Development of Constitutional Liberty in the English Colonies of America." N. Y., 1882.

except in respect to such soil, and to his master, was capable of enjoying legal rights. Glasson thus states the effect the Norman Conquest had upon both conditions:[1] "Historians and jurists maintain that serfs were already very numerous among the Saxons. The Normans are supposed, indeed, to some extent to have raised them out of slavery. By including them in the feudal system, and by admitting them the oath of fealty, the protection of the lord to whom they had been allotted was secured to them. Domesday Book, in fact, teaches us that the villeins were divided among the Norman lords. Thus Archbishop Lanfranc obtained 219 for his Manor of Mellings in Sussex. But were these Saxon-born villeins whom we find mentioned in Domesday Book as (*villani bordarii cotarii*) freemen or slaves before the Conquest? Augustin Thierry and M. Garsonnet maintain that the Conquest of 1066 produced quite the contrary effect; and that, instead of improving the condition of the Saxon serf, it reduced the greater number of freemen to the state of villenage. Both these opinions are, I think, too absolute. The true solution consists in adopting both freed from their exaggerations. There is no doubt that some Saxons descended in the social scale and fell into the class of villeins. . . . After the fusion, and I have already said that it was accomplished very early, the condition of the lower classes rapidly improved. The former Saxon serf doubtless profited by the Norman Conquest, which conferred upon him an improved status."[2] The

[1] Histoire du droit, *etc.*, de l'Angleterre ii. 236, as translated in Edinburgh Rev., July, 1883.

[2] That slavery existed by common law in Pennsylvania is maintained by McKean, C. J., in Pirate *v.* Dalby, 1 Dall. 179, and hence comes the rule *partus sequitur ventrem*. This is distinguished from the rule on villeinage. But as "*villeinage*," said McKean, C. J., "never existed in America, no part of the doctrine founded on that condition can be applicable here." See Cook *v.* Neaff, 3 Yeates, 259. According to Chief Justice Sharswood (Lecture before Law Academy, 1855, p. 22), slavery grew into existence in Pennsylvania by custom, "and that too, with curious modifications. It appears that there were in Pennsylvania two species of slavery derived from birth; the one being in slavery for life, the other for thirty-one years. The latter took place where a child was born of a white mother by a black father."

Imported servants in Pennsylvania, could by custom be bound by indenture to general service; and those servants were a species of property, holding a middle rank between slaves and free-

effect of the Conquest, by introducing in its full force the feudal system, was, therefore, to gradually abolish slavery, and to place the villein under feudal protection; though Littleton divides *villeins* into *villeins regardent*, or attached to the soil, and *villeins in gross*, who were in the main the personal servants of the lord for life. Even as late as the time of James I. traces of villeinage were to be seen in England; and both villeinage and slavery passed slowly away, not by force of any statute, nor by any royal edict abolishing them as inconsistent with the great sanctions of the Constitution, but by the silent unobserved action of custom, which corrodes as well as builds up, which eats away that which is incompatible with the conscience and needs of the people as well as evolves what is required by such conscience and needs. "The state of slavery," says Mr. Freeman,[1] "*never abolished by law*, passed so utterly out of use and out of mind, that English judges who remembered that there had been such a thing as villeinage, denied that there ever had been such a thing as slavery. . . . . *It is characteristic of English history that slavery was finally wiped out from among us, not by a legislative enactment, but by a judicial decision*[2] *which did more credit to the heart of the judges who gave it, than it did to English history.*"

Nor, to pass from a national transmutation so silent and slow that history has failed to record the processes, to a transmutation of vehement and Titanic rapidity surpassed in vastness only by the French revolution, can we fail to notice that though abolition of slavery in the United States was nominally effected by an amendment to the Constitution, it was really effected by the spontaneous and instinctive action of the people as a whole when the civil war closed. It was felt that after what had taken place, slavery could no longer exist. The

den; and they were under the correction of laws exceedingly severe. "This custom seems to have originated with the first adventurers to Virginia, and to have arisen from the circumtances of the country." Bradford, J., Res. *v.* Keppele, 2 Dall. 197; S. C. 1 Yeates, 233. Slavery came without legislation; and though in Pennsylvania it was nominally abolished by legislation, this was not until it shocked the popular sense of right.

[1] Norman Conquest, v. 480.

[2] Sommersett's Case, 20 St. Tr. 1.

legislation that followed recorded, and did not create, abolition.[1]

§ 21. Locke's Carolina constitution is an illustration of the impotence of paper law when brought into conflict with customary law. There can be no question that Locke and Shaftesbury, aided as they were by consummate legal advisers, were as well fitted as any class of men could be to form a paper constitution. They were thoroughly familiar with the English system. They explored antiquity for precedents. They gathered all the information they could as to the climate, the soil, the physical peculiarities, the people, to whom the new constitution was to be adapted. But it was impossible for a scheme framed in the closets of English philosophers to be adapted to the wants and meet the convictions of the settlers of a new world. "The really fatal defect of the system," says an intelligent commentator, "was its lack of elasticity, its disregard for local peculiarities and variety of natural conditions, its inability to meet unforeseen forms of social and political growth." "For all practical purposes Locke's constitution, with its elaborate details and minute provisions, might as well have never existed."[2] This was not from want of care on the part of its projectors. The constitution was adopted and sent on to the Carolinas in 1667. In 1670 (just a century before the adoption of the first of our articles of confederation) it was amended; it was amended again in 1682. Locke's correspondence shows how much study was

Paper law giving way to instinctive and customary law.

[1] The gradual growth and equally gradual disappearance of slavery is illustrated in Mr. Frederick Seebohm's essay on the "English Village Community," published in London in 1883. Mr. Seebohm shows that in Saxon England the village community consisted of a manor, with a lord and court, its villeins, its cottiers, and, in the earlier periods, its slaves. The serfs were the "land-slaves" of the lord; the lord and his immediate dependents being the sole freemen in the community. These serfs gradually and unobservedly, as far as any legislative or judicial action was concerned, rose from the condition of slaves bound to whatever services the lord might require to that of villeins bound only to services fixed by custom, and then to that of freemen. How far English serfdom was the product of Roman and not German conquest, a point urged by Mr. Seebohm (in opposition to Maurer) with singular vivacity and power, is without our present range of discussion.

[2] Doyle's English Colonies in America, 335, 338.

spent in adopting the constitution, not only to the permanent conditions but to the varying moods of the colonies. But for all this, the constitution and code, though they were nominally in force for years, never went into operation. The laws according to which the people of the Carolinas acted were not the laws imposed by the sovereign; the laws imposed by the sovereign were not the laws of which the people took even cognizance.[1]—Another illustration of the failure of *a priori*

[1] It may not be out of place to notice some of the prominent features of the system thus devised. The government was to be under the control of the owners of the soil. The proprietors, who were eight in number, were with other nobles to constitute the aristocracy. The oldest proprietor was to rank as "Palatine," being a chief executive, and was to be succeeded by the proprietor next in age. The country was to be divided into counties, each county containing eight seigniories, eight baronies, and twenty-four colonies. Each proprietor was to hold one seigniory in every county; the baronies were to go to the nobility who were not proprietors; the colonies were to be assigned to the commonalty. After 1710, alienation of land was to be forbidden, and rank and land were to be transferred only by inheritance. The judicial and executive power was to be vested in the proprietors, one of whom was to be chief justice, another chancellor. The eight proprietors were to constitute as a body the "Palatine's court," of which four constituted a quorum, with power of pardon, of veto, and of disposition of appropriations. The Grand Council, consisting of the proprietors and of "Councillors" from the various courts, was a final court of appeal, and added to this jurisdiction the somewhat incongruous functions of initiating all legislation, and of declaring peace and war. The Legislature was to consist of a single house, composed of the proprietors and their deputies, the "landgraves" and "caciques" (these not very consistent titles designating the aristocracy inferior in rank to the proprietors), and the representatives of the freeholders, who were to be chosen in single districts by voters owning at least fifty acres. A majority of a quorum of the whole number carried a measure unless a proprietor in person or in proxy objected to it as unconstitutional. In this case the four orders sat separately, and if any one order sustained the objection, the measure was lost. No religious establishment was provided for, though Parliament had power at a future period, when required by the state of the country, to establish the church of England. There was to be in the mean time toleration of Christian churches of all denominations, and it was held that any seven persons might constitute a church; but it was then provided that an adult not belonging to such a church should be excluded, not only from office, but from the protection of the law; an exclusion only to be explained, when we remember that Shaftesbury and Locke were latitudinarians, by supposing that the word "church" comprehended social as well as ecclesiastical organization. Slavery was to be retained, and over the slave the master was to have power and authority. Villeinage

laws to take effect when not called for by popular conscience and need is to found in that feature in William Penn's original plan of government which provided that municipal laws should be adopted by a *plebiscite*. The people of the province found this impracticable, and petitioned for its abrogation on the ground that their "inability in estate and unskilfulness in matters of government did not permit them to serve in so large a council and assembly." And though never formally recalled by Penn, the scheme never went into operation.[1] Other instances will be found in succeeding sections, where the early systems of government proposed for the colonies will be noticed in detail. It is sufficient to say that in each colony there were two schemes of law, one titular and unreal, imposed by the sovereign, the other uncodified but operative, emanating from the people.[2]

§ 22. Every statute, peremptory though it be, is compelled to yield to the same influences. This may be in three ways. (1) The statute may become obsolete, as was the case with the English statutes of Elizabeth's reign, imposing severe penalties on papists and dissenters; (2) or it may be dropped by general consent, in submission to the necessities of the case; (3) or the courts, in submission to the same necessities, may call in the aid of fictions to rob it of efficiency; or, by virtue of the rule that a statute derogating from popular liberty or popular rights is to be construed strictly, may minimize its operation. Of the latter mode of getting rid of statutes, we have a striking illustration in the English ruling in Taltarum's Case, by which the Court of King's Bench evaded the statute *de donis conditionalibus* by the sanctioning of common recoveries which

Law made to bend to national conditions.

was to be reproduced in a class of "leet-men" who were to constitute an intermediate body between the landed proprietors and the slaves, and who were to be attached permanently to the plantations to which they were assigned. See Jones's Hist. Georgia, i. 67.

[1] See as to Burke's views on this point *infra*, § 53.

[2] See *infra*, §§ 22–4. Of William Penn's charter, the sixth section of which undertook to set forth laws for the province, Judge Sharswood, in a lecture before the Law Academy, in 1855, says that it "cannot be considered as the rule for determining what was or was not the extent of the English laws adopted here. As far as I am informed it was never so considered. . . . It appears, accordingly, to have been entirely disregarded."

were collusive actions by which entailed estates could be "recovered" by the demandant, and the disappointed issue left to their remedy against a man of straw, who was usually the crier of the court. In other words, a statute provides that land may be so entailed as to be absolutely inalienable as long as there are heirs of the character prescribed in the limitation. The courts, by the fiction of a title antecedent to the entail, annul the statute.[1] What has been said in respect to statutes applies equally to the common law. "There are in nature," says Bacon, "certain fountains of justice whence the civil laws are derived, but as streams, and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the region and governments where they are planted, though they proceed from the same fountain."[2]

[1] For an exposition of the errors of the analytical school in this relation see *infra*, § 100.

[2] Bacon, Advancement of Learning, Book II. See more fully *infra*, § 85.

In R. *v.* Foote, 48 L. T. N. S. 733, it was said by Lord Coleridge, C. J., in charging the jury: "Gentlemen, you have heard with truth that these things are, according to the old law, if the dicta of old judges, dicta often not necessary for the decisions, are to be taken as of absolute and unqualified authority—that these things, I say, are undoubtedly blasphemous libels, simply and without more, because they question the truth of Christianity. But I repeat what I said on the former trial that, for reasons which I will presently explain, these dicta cannot be taken to be a true statement of the law, as the law is now. It is *no longer true, in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land.* . . . Therefore, to base the prosecution of a bare denial of the truth of Christianity, *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be so by Lord Hale, and Lord Raymond, and Lord Tenterden, is in my judgment a mistake. *It is to forget that law grows; and that though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression, I call it progression of human opinion.* . . . There is a case reported by Lord Chief Baron Gilbert, R. *v.* Bedford, from which it appears that a man was actually convicted of a seditious libel for discussing gravely and civilly, and as the report of the case in Bacon's Abridgment, tit. Libel, says, 'without any reflection whatever upon any part of the then existing government,' the respective advantages of an hereditary or elective monarchy. I need hardly say that if such a case arose now no judge would follow that authority, no jury would convict, the whole proceeding would be denounced, and rightly denounced, as altogether monstrous."

"I do not find a model in the world that time, place, and some singular

§ 23. Pennsylvania may be taken as a conspicuous illustration of the position that, at least in the earlier stages of a community, laws, moulded by the conditions of a people, are inspired by its conscience and needs, and not dictated by a sovereign. Pennsylvania was in part settled by English colonists, who, it has been repeatedly declared, brought with them the English common law. In Pennsylvania, down to the Revolution, the British Parliament was as absolute as in England. Yet not only did the judges of the Supreme Court, in answer to a request from the legislature, announce that numerous of the oldest British statutes had

Illustrated in Pennsylvania.

emergencies, have not necessarily altered; nor is it easy to frame a civil government that shall serve all places alike." Preface to Penn's Frame of Government, 1682. "There is hardly one form of government, as designed by its first founders, that in good hands would not do well enough; and the best in ill ones can do nothing that is great and good." Ib. "Governments rather depend upon men than men on governments." Ib.

"When it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules, or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the unwritten law of England, and we have adopted *it as a constantly improving science rather than as an art; as a system of legal logic rather than a code of rules.*" Morgan *v.* King, 30 Barb. 14.

In Dane's Abridgment, VI. art. vii. § 2, there is an enumeration of the British statutes which were at any time in force in Massachusetts. It is said by that eminent author that "there is no question more difficult to be answered than this: What British statutes were adopted in the British colonies? In the chartered colonies but few were adopted and practised upon; in the proprietary colonies not many; in the royal colonies usually a great many."

Dr. Franklin thus speaks of this process of adopting and discarding by the colonists, as communities, of the laws imposed by their common sovereign. "The settlers of colonies in America did not carry with them the laws of the land as being bound by them wherever they should settle. They left the realm to avoid the inconveniences and hardships they were under, where some of these laws were in force, particularly ecclesiastical laws, those for the payment of tithes and others. Had it been understood that they were to carry these laws with them, they had better have stayed at home among their friends, unexposed to the risks and toils of a new settlement. *They carried with them a right to such part of the laws of the land as they should judge advantageous or useful to them: a right to be free from those they thought hurtful, and a right to make such others as they should think necessary*, not infringing the general rights of Englishmen; and such new laws they were to form as agreeable as might be to the laws of England." See other authorities, *infra*, § 64.

never been in force in the state,[1] but they declared, as a rule, that British statutes, made even before the settlement of the province, were not in force in it unless "convenient and adapted to the circumstances of the country."[2] The judges do not say, "we decide that these statutes are not to be regarded as hereafter in force." What they virtually say is: "These statutes never were in force here." But why? They had been enacted by the British Parliament, many of them before Pennsylvania had been settled; and a series of other statutes were declared to be in force because enacted by the British Parliament; this being held to be the case with the statute of limitations, 32 Hen. VIII.;[3] the statute of additions, 1 Hen. V.;[4] the statute of escapes, 13 Edw. I.;[5] and, what is still more remarkable, the statutes of mortmain.[6] On the other hand, the statute *quia emptores*, 18 Edw. I., was declared never to have been in force in the province;[7] nor the statute of 13 Eliz. c. 4, as to charitable uses;[8] nor the statute of frauds, 29 Chas. II.[9] The full extent of the change effected can be best seen by the following table:—

The Law the English Settlers of Pennsylvania brought with them in 1664 and 1681.	The Law that was found to exist in 1776.
1. Primogeniture.	1. Equal division.
2. Livery of seisin, or unrecorded deeds.	2. Registry of deeds as a substitute for livery of seisin.[10]
3. Market overt, giving unimpeachable title to goods sold in it.	3. No market overt.
4. Non-liability of real estate for debts.	4. Real estate assets for debt.
5. Estates tail only barred by the tedious and difficult process of fine and recovery.	5. Estates tail barred by simple deed.
6. Joint tenancy of real estate by which the survivor takes the whole encouraged.	6. Joint tenancy discouraged and only permitted when expressly prescribed.

[1] *Supra*, § 2.
[2] Morris *v.* Vanderen, 1 Dall. 64.
[3] Boehm *v.* Engle, 1 Dall. 15.
[4] Com. *v.* France, 2 Brewst. 568.
[5] Shewell *v.* Fell, 3 Yeates, 17.
[6] 3 Binn. App. 626; Methodist Church *v.* Remington, 1 Watts, 218.
[7] Ingersoll *v.* Sergeant, 1 Whart. 337.
[8] Witman *v.* Lex, 17 S. & R. 88.
[9] Anon. 1 Dall. 1.
[10] Sir H. Maine (Dissertation on Early Law and Custom, 1883, p. 358) traces, in a passage of great interest, the "evolu-

7. Birth of live issue necessary to tenancy by curtesy.	7. No such requisite.
8. Inheritance never ascends.	8. Inheritance ascends where there is no issue.
9. Half-blood do not inherit.	9. Half blood inherit.
10. All felonies punishable capitally, and corporal chastisement in other cases imposed.	10. Capital offences gradually reduced to murder, and corporal chastisement gradually dropped.[1]
11. Defendant in criminal cases not entitled to counsel.	11. Defendant in criminal cases entitled to counsel.
12. Ecclesiastical penalties imposed by ecclesiastical but not civil courts.	12. No ecclesiastical courts recognized, but sexual offences punishable in England only by ecclesiastical courts punished in common law courts.
13. Corruption of blood worked by conviction of felony.	13. No such penalty known as corruption of blood.
14. Malicious mischief absorbed in statutes.	14. Malicious mischief extended so as to embrace all malicious injuries to another's person or property.
15. Jurisdiction of intestate estates vested in ecclesiastical courts.	15. Jurisdiction of intestate estates vested in a secular court.
16. Equity jurisdiction vested in court of chancery.	16. No court of chancery, but equity remedies in part administered through common law forms.
17. Foreign attachment only permitted by local custom.	17. Foreign attachment permitted in all cases of non-resident debtors.
18. Replevin only used to recover goods distrained for rent.	18. Replevin used in all cases in which it is alleged goods are unlawfully detained.
19. Women not capable of binding themselves by specialty.	19. Women capable of binding themselves by specialty.[2]
20. Married women (unless by local custom) cannot convey real estate except by fine in which there is an examination separate and apart from husband.	20. Married women convey by simple conveyance on separate examination and acknowledgment.[3]

---

tion" of registry from livery of seisin and other modes of primitive public transfer. "The public register at some accessible spot, in which all transactions must be registered under penalty of immediately forfeiting all their benefits, pretty much corresponds to the primitive assembly of the village before which all transfers of shares in the domain must be accomplished, in order that the brotherhood may consent to them and supply evidence of them by the general recollection."

[1] That by mere custom, without statute, the ducking stool became obsolete, see James *v.* Com., 12 S. & R. 220.

[2] Burke *v.* Winkle, 2 S. & R. 189.

[3] As is pointed out by Mr. Wm. Henry Rawle, in an admirable address

21. Trustees not entitled to commissions.	21. Trustees entitled to reasonable commissions.
22. Widow not entitled to dower of trust estate.	22. Widow entitled to dower of trust estate.
23. Popish recusancy highly penal and Protestant "conventicles" unlawful.	23. Complete religious toleration recognized.
24. Tithes.	24. No tithes.
25. Agreements to supersede courts by voluntary settlement illegal.	25. Courts in a large measure superseded by arbitration.
26. Statute of Elizabeth as to charitable uses in force.	26. Statute of Elizabeth as to charitable uses not in force.
27. Statute of Edward as to superstitious uses in force.	27. No uses which are religious deemed superstitous; statute of Edward not in force.[1]
28. Beds of unnavigable rivers belong to riparian proprietors.	27. Beds of unnavigable rivers belong, when the river is of considerable extent and width, to the public.

Here, then, we have what is virtually a new jurisprudence erected. By whom was this done? If not by the sovereign, then the main contention of the analytical school, that it is essential to law that it should be imposed by a sovereign and enforced by a sovereign, falls. The sovereign of Pennsylvania was, during this hundred years of law-making, the king and parliament of Great Britain; but the changes above specified, so far from being imposed by the king and parliament of Great Britain were some of them negatived by king in council, and would few of them have received royal or parliamentary assent. It may be said that the governor and provincial legislature of Pennsylvania were sovereign. But very few of these changes received colonial official approval until long after they had been accepted as law; nor were they the creatures of the courts, for when the courts took cognizance of them it was as of a law already settled. The opinion of the judges, stating that certain English statutes had been dropped, and certain others retained in Pennsylvania, is an illustration of this recognition, for it is a part of the case thus made that the dropping and retention was done by neither

before the University of Pennsylvania, in 1881, until 1770 acknowledgement and separate examination were not necessary in such cases.

[1] Method. E. Ch. *v.* Remington, 1 Watts, 218; Magill *v.* Brown, 1 Brightly, 346, 373.

legislature nor court.[1] The books contain numerous recognitions of the same conditions by the courts. Thus in one of the earliest cases after the Revolution the chief justice traces the change in the law "to universal opinion,"[2] and Judge Ship-

[1] In the report of the judges of the Pennsylvania Supreme Court, made in 1808, on the question as to what British statutes were in force in Pennsylvania, this power of modification and of rejection is asserted in the broadest terms. (As to statute *quia emptores*, see *inf.* § 34, note.) After stating that by the charter the English law of property was to remain in force until altered by law, the report proceeds: "Notwithstanding the generality of these expressions, it has always been held, that many of the English laws relating both to property and to felonies would have been improper for the state of things in an infant colony; and accordingly they were never practically extended here. It is the true principle of colonization that the emigrants from the mother country carry with them such laws as are useful in their new situation, and none other." Roberts's Dig. xvi. As an instance of this process of modification may be noticed what is said by judges on the important question of mortmain: "These statutes (of mortmain) are so far in force that all conveyances, either by deed or will, of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of Assembly. So, also, are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a superstitious nature and not calculated to promote objects of charity or utility." Judge Brackenridge, one of the judges of the Supreme Court of Pennsylvania at the time when the above questions were propounded, published in 1814 an interesting narrative of the circumstances under which the judges undertook the commission. He calls attention to the fact that, by an act of Assembly, passed January 28, 1777, during the administration of Governor Thomas Wharton, it is provided that only such "of the common law as is adopted in usage, and such of the statute laws of England as have been heretofore in force in said province, shall be in force, except as hereafter excepted." "It becomes," he says further, "a matter of evidence what statutes have been in force by the adjudications of the Supreme Court, *and to be collected amongst* other means of information, even *from oral testimony*." Then comes the following: "If it be admitted that an English statute would be in force by particularly naming the colonies, so as to establish a rule of property, or a principle of municipal regulation, I do not see how we can justify the opposition to an English statute imposing a direct tax; much less to a statute which went indirectly to collect a revenue by duties on internal or external commerce."

That slavery was held to exist in Pennsylvania by force of custom, see *supra*, § 20. In Resp. *v.* Mesca, 1 Dall. 73, the court permitted a witness to be called to prove that before the Revolution the statute Edw. III. ch. 13, allowing foreigners to have a mixed jury, was in force in Pennsylvania.

See also Judge Thayer's address on the Law as a Progessive Science, 1870.

[2] See Guardians of the Poor *v.* Greene, 5 Binn. 554, where this is illustrated by Tilghman, C. J.

pen attributes the change to the "people of Pennsylvania" giving their conduct and laws a more republican cast by dividing the lands."[1] The execution of deeds by married women was sustained, not because the sovereign ordered it, or because the legislature had enacted it, but because the practice had prevailed in the province from its first settlement.[2] Such had been "the constant usage of the province," and hence it was the province's constant law.[3] Trustees have had proper compensation in Pennsylvania, "extending as far back as the testamentary law can be traced."[4] "We know," said McKean, C. J., in 1783, "that many statutes, for near a century, have been practised under, in the late province, which were never adopted by the legislature; and that they might be admitted by usage, and so become in force, was the opinion of the British Parliament, declared by a statute passed in 1754, enabling legatees to be witnesses to wills and testaments."[5] So it was with the modification of the law of waste. "It would be an outrage on common sense to suppose that what would be deemed waste in England would receive that appellation here."[6] So it was with the extension of the writ of replevin. "After the present practice on replevin *has been of so many years standing, and seems founded on a law of our own*, we think it would be improper to make such an alteration as would be occasioned by issuing judicial writs *de proprietate probanda*."[7] It was not, then, the courts or the legislature that made the law for the people, but the people that made the law for the legislature and the courts. No more pregnant proof could we have of the truth of Burke's statement that it is of the essence of law that it should be declaratory; no more striking evidence of the want of universality of the rule of the analytical school that it is essential to a law that it should be imposed and enforced by a political superior. Yet when it is here asserted that law, as in the case before us, was imposed by the people on the legislature and courts, and not by courts and legislature on the

[1] Morris *v.* Smith, 1 Yeates, 238.
[2] Davy *v.* Turner, 1 Dall. 12.
[3] Lloyd *v.* Taylor, 1 Dall. 17.
[4] Wilson *v.* Wilson, 3 Binn. 57; see Carson *v.* Blazer, 2 Binn. 475.
[5] Resp. *v.* Mesca, 1 Dall. 73.
[6] Per Cur. Hastings *v.* Crunkleton, 3 Yeates, 261.
[7] Shippen, President J., Weaver *v.* Lawrence, 1 Dall. 156.

people, it must be remembered that "people" is not to be understood in the sense of the entire population of the province acting legislatively. Penn, as we have seen, undertook to establish such a system, but it almost immediately broke down. It was not so that the laws were made; it is not so that laws can be ever made. The legislation of colonial Pennsylvania was not conscious but unconscious; did not mould circumstances, but was moulded by circumstances; sprung not from the deliberations of statesmen, but from the needs of the people; came into being without a known author, and deepened into precedent by the pressure of usage mainly involuntary; acquired the force of a law not because it had been deliberated on and then enacted, but because it had not been deliberated on at all. It was an emanation and not an endeavor; an instinct and not a project; and hence, when spoken of afterwards by the judges, it is as of a rule that operated in the province from its settlement, simply because in its unobserved development there is no period of origination to which it can be traced.[1]

[1] **1st.** *As to the silence and irresponsibility of the process of evolution.*—Several observations of Pennsylvania judges on this point are given above. With these may be coupled the following: "The common law of Pennsylvania," says Mr. Peter McCall, in an address before the Law Academy in 1838, "is made up of customs whose source is lost in obscurity. Most of them sprung from the peculiar polity of our colonial institutions, and not a few, as the doctrine of riparian rights on our great navigable rivers, from local and physical causes." "It was the delicate and difficult duty of the judge to speak where the legislature had been silent, that legislation of common consent, which, in every country, insensibly wears the channels of the law to the current of the times." Judge Shippen has been styled the father of the law of replevin in this state, as he was that of the practice in foreign attachments. But, as Mr. McCall shows, the extension of replevin to all claims for the recovery of goods was recognized in practice long before Judge Shippen's day. To the same effect is Judge Strong's argument in the address, already noticed (*supra*, § 21), on the growth of the law.

In a pamphlet, said to be by Judge J. Hopkinson, published in 1808, entitled "Considerations on the Jurisprudence of the State of Pennsylvania," we have the following: "In some parts of the United States an American common law has insensibly grown into existence. Those who are acquainted with the jurisprudence of our Oriental (Eastern) States will be very sensible of the truth of this observation. *Even in some of the Middle States traces of a common law, variant from that of the mother country, may be found.*" . . . "The common law of

§ 24. It is interesting to contrast also the workings of national conscience and need in the formation of law in Mas-

England has been much altered, extended, abridged, and explained by different acts of Parliament, and by a course of judicial decisions in the English tribunals. In some parts of the United States of America these different acts of Parliament, and this sucession of judicial decisions, are recognized as authoritative. In some parts they are admitted with limitations and qualifications, while in others they are totally rejected." The same general view is ably illustrated in a lecture by Judge Sharswood on Pennsylvania Common Law, delivered before the Law Academy in 1855.

"Before the Revolution," says Mr. William Rawle (the elder), in a Bar address of 1824, "when the bench was rarely graced by professional characters, juries were considered almost the same as chancellors. I have heard the epithet applied to them, and the practice defended by old practitioners." It was, therefore, from juries temporarily and transiently emerging from and then subsiding into the body of the community that arose the Pennsylvania equity practice. A jury, for instance, found a conditional verdict; the conditional verdict was accepted by the court; the precedent was followed; and gradually common law suits with conditional verdicts took the place of bills in equity. As to the evolution of equity, see *infra*, § 35.

The fluctuation attending this process of evolution—"spiral," as it is called by an eminent English critic—is illustrated by the assertion by Judge Duncan, in Spangler *v.* Com., 16 S. & R. 70, that the English practice of sheriff's inquests was never adopted in Pennsylvania, and it is declared "not to be warranted" in Weaver *v.* Lawrence, 1 Dall. 156. On the other hand, Mr. McCall, in an address to the Law Academy in 1838, gives the record of such an inquest as held in Chester County in 1718.

2d. *Factors in evolution.*—It must be recollected that the first settlers on the Delaware were Swedes, who held possession between 1638 and 1655, planting churches, which are still in existence, and establishing courts. In the instructions of Printz, who was appointed director of the Swedish colony on the Delaware in 1643, he was ordered to decide all controversies "according to the laws, customs, and usages of Sweden." Penn. Archives, 2d ser. v. 783. The records of the Swedish courts were lost in a Stockholm fire. Interesting notices of the Swedish settlement on the Delaware will be found in "The Record of the Court at Upland in Pennsylvania, 1676 to 1681," Philadelphia, published by the Historical Society of Pennsylvania in 1869, and in "A History of New Sweden, by Israel Acrelius," translated by Dr. Reynolds, and published by the same society in 1875. The Swedes were conquered by the Dutch in 1655. The Dutch governors were required to maintain the "laws, ordinances, and resolutions of their High Mightinesses the States General." Duke of York's Laws, App. 429. Courts were organized by the Dutch on the Delaware; and trials for the determination of issues, civil and criminal, were held. Of one of these, that of Jacquet for misconduct, there is a detailed report. Penn. Archives, 2d ser. vii. 501. "That a regular set of laws, or, more properly speaking, ordinances, were sent from New Amsterdam to the Delaware, and there proclaimed for the general government of that territory,

sachusetts, with the working of the same factors in Rhode Island. The settlers of Massachusetts were in the main men

shortly after its conquest by the Dutch, there is no doubt." App. to Duke of York's Laws, ed. 1879.

The constitution of the Dutch courts on the Delaware, and the fundamental rules of law promulgated by the Dutch government, are given in Smith's Hist. Delaware Co., pp. 79 *et seq.* That Dutch law governs the old Dutch titles, see Peapatch Case, 1 Wal. Jr., App. ix.

The English supremacy began in 1664. In 1676 was promulgated a code known as the Duke of York's Laws, providing for the establishment of the Church of England and of civil institutions on the English model. This code has been republished under the title of "Charter and Laws of Pennsylvania, passed between 1682 and 1700, preceded by the Duke of York's Laws in force from 1676 to 1682, with an appendix, etc. Published under the direction of John Blair Linn, Secretary of the Commonwealth, Harrisburg, 1879." An interesting review of the volume by Mr. Lawrence Lewis, Jr., is in the 5th volume of the Pennsylvania Magazine, pp. 141 *et seq.*

The relationship of these systems is a question of much interest if we assume, as is assumed by Blackstone (see *infra*, § 64), that a conquered country retains its common law which becomes the necessary basis of the common law imposed by the conqueror. But be this as it may, the fact that, at the time Penn's system went into operation, at least half the population of the settlements on the Delaware were Swedes, is important as explaining the comprehensive character of the common law evolved by the population of Swedes and English thus combined, and the many points in which this common law differs from the English common law. The several theories as to the planting of the common law are given, *infra*, § 64.

According to an anonymous case, decided in 1754 by the Supreme Court of Pennsylvania, the "settlement" of Pennsylvania, prior to which the English statutes were in force, was at the time of the grant to the Duke of York. Hence the statute of frauds, passed in 1676, to take effect in 1677, three years before the charters to William Penn, was held in this case not to be in force, the Duke of York's code taking effect Sept. 25, 1676.

3d. *People wiser than their legislators.* —Of *a priori* and speculative legislation there was enough in the early history of Pennsylvania, but, so far as it was otherwise than declaratory of the laws and customs actually existing or coming naturally into existence, it was inoperative. Of the inoperativeness of this kind of legislation we may notice the early colonial statutes prohibiting drinking of healths, and substituting for the popular designations of months and days the Quaker phraseology of "First month, "First day," etc. In the same line may be mentioned a statute prohibiting smoking in the streets. Harmony Fire Co. *v.* Fire Ass., 35 Penn. St. 496. When an existing statute was not thus declaratory of the popular sense of right and need, the courts did not hesitate to strain it until it became thus declaratory. Thus we are told the early statutes were construed with the utmost latitude so as to make lands subject to debts (Morris *v.* Smith, 1 Yeates, 238); the statute as to executors was, by a like latitude of interpretation, extended to trustees (Wilson *v.* Wilson, 3 Binn. 560); and a like expansive pressure was applied to the law in respect to joint tenants. Bam-

who left England in order to obtain a free exercise of their religion. They were conscientious Puritans; they held that Scripture (differing in this respect from Hooker and other leading English theologians of that day) laid down not only absolute rules of *jure divino* dogma, but absolute rules of *jure divino* church polity and ceremony and absolute rules of *jure divino* secular government, such government being thus made a theocracy. The truths of Scripture, however, were not to be interpreted by the individual but by the church; and the church in this sense was each particular congregation of the elect. Rhode Island, on the other hand, was settled in the main by men who left Massachusetts for conscience' sake, they conscientiously believing, as a general rule, that the Bible was a divine rule of faith, but holding that it was to be intrepreted by each individual according to his own notions, and not by the church, either general or local. In one respect Massachusetts and Rhode Island are alike. In neither province were the laws that were in operation the laws imposed by the sovereign. It would be the absurdest fiction to suppose that James I., or Charles I., or Charles II., or even William III., authorized either the laws of Massachusetts making Puritanism compulsory, or the laws of Rhode Island punishing compulsory Puritanism. In Rhode Island, for instance, it was held penal for a husband to prevent his wife from attending Roger Williams's preaching,[1] Roger Williams, for this very preaching,

In Massachusetts, Rhode Island, and Louisiana.

baugh *v.* Bambaugh, 11 S. & R. 192. So it was as to the legislation as to replevin. The statute of 1705, so observe the commissioners appointed to revise the civil code in their report of 1836 (p. 30), "seems to confine the action to cases in which it may be brought in England; but it has been remarked that it is of much more extensive use. 1 Dall. 150; 5 S. & R. 131." So the converse, that statutes will be restrained, when required by circumstances, holds good. Provisions which formerly were construed liberally, should now receive a strict construction from the change of circumstances." Per Cur. Res. *v.* Devore, 1 Yeates, 501. And this contraction may finally end in extinction. "The usages of any people may outgrow even their statutory law, and in modern times long-continued departures from the requirements of legislative acts have sometimes been treated as evidence that the statutes are no longer in force, though never formally repealed." Judge Strong's Address on the Growth of the Law, Phil., 1879.

[1] See Durfee's Judicial History of Rhode Island, 8–9.

being held indictable in Massachusetts; but in neither province was this sanction prescribed by statute. The offence was held to be an offence at common law; in other words, it was made so by the conscience and supposed needs of the particular community. So it was with regard to property. There was no statute of distribution and of descent, for instance, in Rhode Island, until comparatively recent days. The common law, however, was modified as it were unconsciously and spontaneously so as to adopt itself to the popular sense of right. At first the eldest son took the intestate father's whole landed estate, this being in conformity with English tradition, and not unsuitable in a country where the constant presence of hostile Indians, to say nothing of hostile neighbors of European descent, made politic the massing of estates in the hands of heads of families, who might exercise semi-feudal authority. This afterwards gradually shaded away into an allotment of a double portion to the eldest son. It does not appear, however, that this modification, any more than the still more marked modifications of the law of descent in Pennsylvania, where there was less to make primogeniture even temporarily politic, was ever put in the shape of a statute and sent to England for approval. It neither came from a sovereign nor was it enforced by a sovereign. It did not come by statute, nor was it enforced by statute. It did not come "with observation," nor was it preceded by political agitation or even political speculation. It was the slow and automatic outgrowth of popular conscience and growth; as little heralded by the eloquence of the tribune or the logic of economist, as were the kindred changes in Pennsylvania.[1] It was so in Massachusetts, where similar changes were made in the same unnoticed and instinctive way. It was so, to go to the opposite pole of jurisprudence, in Louisiana. The

[1] In Newport, during "the first year of the settlement, the judicial power was confided to a judge with elders, the judge having a double vote; and, for anything that appears, was never exercised in town meeting." Durfee's Judicial History, 5. This, by slow process, keeping pace with the growth of population, developed into a formal judiciary learned in the law. At first all deeds were acknowledged by a sort of livery of seisin, in open town meeting. This gradually was changed into the system of acknowledgment before a notary or magistrate, as it now exists.

French colonists of that country brought with them the Roman common law, yet to that common law the same process of selection and rejection was applied as was applied by the English settlers of the Atlantic coast to the English common law. That part of the Roman common law which was not suited to the soil and environments of the new colony law perished; that which was so suited, survived. This was not the work of a colonial legislature, for there was no colonial legislature in Louisiana. It was not the work of the French crown, for it was the peculiar policy of France, in which all French sovereigns have agreed, to reproduce in the colony all the institutions of the parent empire. Yet, when Louisiana became a state in the American Union, nothing is more remarkable in the reports of the Supreme Court, distinguished as are those reports for the masterly knowledge they exhibit of the Roman law, than the emphasis with which the judges declare that certain rules of the Roman law had been from the beginning in force in Louisiana, while others had not been so in force. But why? Not because there had been any legislative code or royal decree authorizing such discrimination, but because it was dictated by the popular sense of right and need.

So of other states.

§ 25. We shall hereafter have occasion to discuss, in connection with the origin of law, the conflicting theories as to the origin of law in the North American colonies now constituting part of the United States. It is sufficient now to say that in all our states, except Louisiana, the English common law, modified to respond to the conscience and meet the needs of the particular community, is the basis of local municipal law.[1] The Plymouth

[1] As to the conflicting theories on this topic, see, *infra*, § 64; 1 Kent's Com. 467–472–3; 1 Story Const. §§ 156–8; Walker's Am. Law, § 48; U. S. *v.* Worrall, 2 Dall. 384; Van Ness *v.* Packard, 2 Pet. 137; Wheaton *v.* Peters, 8 Pet. 591; Com. *v.* Knowlton, 2 Mass. 530; Morris *v.* Vanderen, 1 Dall. 64, and cases cited; Whart. Crim. Law, 8th ed. § 15 *a*. That the common law is not in force on its criminal side in Ohio and Indiana, see Smith *v.* State, 12 Oh. St. 466; Jones *v.* State, 59 Ind. 229. That common law crimes are not indictable as such in the Federal courts, see Whart. Crim. Law, 8th ed., § 253.

"As the rules of the common law are introduced by experience and custom, so they may be withdrawn by discontinuance and disuse. Numerous in-

colonists, before landing, agreed to adopt the English common law for their government, subject to such modifications as their circumstances required;[1] in Virginia the first legislative assembly resolved to adhere to the "customs of England as nearly as the capacity of the country would admit."[2] This was the general system along the whole Atlantic seaboard. The English common law was accepted as the basis, but it was adapted to the needs of the community by popular spontaneous action, sometimes followed by legislative approval, sometimes not so followed.[3] As to the English statutes which were in force there has been, as we have seen, a great difference of opinion. The course taken in Pennsylvania has been already noticed. The first constitution of New York after the Revolution prescribed that "such parts of the common law of England and of the statute law of England and Great Britain . . . which did form the law of such colony on the nineteenth day of April, 1775,

stances of the conduct of the colonies settled in America evince the force and extent of this remark." (Wilson's Lectures, ii. 53)

In the first of an able series of articles in the Albany Law Journal (vol. 20, p. 326), on the particular jurisprudence of New York, it is said that "the several civil governments, and even the various political parties which have controlled New York from its origin, have each made its mark upon the character of its legislation; to regard the laws of New York as a uniform system would be to ignore the irresistible logic of facts. In the space of two hundred years New York has been governed by three separate powers, and by four distinct species of government: the States-General of Holland; as a proprietary, Count Palatine, under the brother of Charles Second; as a royal province of England; and as a state of the United States. Disregarding the minor or more subtile subdivisions of those governmental periods, it is not difficult to trace the influence which each government has had on the body of the law."

[1] Elliot's Debates, i. 24.

[2] Chalmer's Annals, 245.

[3] As to the theories bearing on this question, see *infra*, § 64.

The process has been sometimes conducted on principles now difficult to discover. Thus the statute of 43 Eliz. c. 4 (the statute of charitable uses), which provides that land may be devised to a corporation for a charitable use, has been held, in New York, not to be in force; Jackson *v.* Hammond, 2 Caines's Cases in Error, 337; Bascom *v.* Albertson, 34 N. Y. 584; and so in New Jersey, Norris *v.* Thompson, 19 N. J. Eq. 307, 575; while it has been held to be in force in Massachusetts, Burbank *v.* Whitney, 11 Mass. 146; North Carolina, Griffin *v.* Graham, 1 Hawks, 96; and Kentucky, Gass *v.* Wilhite, 2 Dana, 170. So, while the statute of frauds was held, as we have seen, not to be in force in Pennsylvania, it was ruled to be in force in Rhode Island, Clerk *v.* Russell, 3 Dall. 415.

shall continue to be the law of the state." This, however, still leaves open the question which of the statutes and what part of the common law were in force in 1775. The position has been generally accepted, that all English statutes adopted, as modifications of the common law, prior to the English colonization of America, were brought with them by the colonists, while only such subsequent statutes as were applicable to local conditions, or as were made binding by parliament,[1] were regarded as of force. But as to statutes of all classes, as well as to the common law, the process of acceptance or rejection was one applied by the community itself, and was impelled by local necessity and local sense of right. If legislation followed sanctioning the change, this legislation was declaratory of, not productive of, such change.[2] This was the case with the new states as well as with the old ;[3] each, whether old or new, assimilating or rejecting that which suited its particular condition. Thus, in New England (excepting Rhode Island), Puritan ecclesiasticism was grafted on the common law in the place of Anglican ecclesiasticism; while in Pennsylvania there was religious toleration, and a tendency, imparted by the Society of Friends, to substitute voluntary arbitration for compulsory litigation. The old English common law as to slavery, as distinguished from serfdom, was retained in those jurisdictions in which slavery existed ;[4] slavery being introduced without statute, and finally, when abolished, owing the legal expression of such abolition to statutes or constitutional amendments which were merely declaratory of an abolition which had already taken place. The same may be said of the modification of the common law already noticed, by which the beds of our great unnavigable rivers (*e. g.*, the Susquehanna) have been held to belong to the public, and not to the riparian proprietors; and so it may

[1] See 21 Alb. L. J. 269–270 for an excellent summary of the conflict on this point.

[2] See cases cited above; Patterson *v.* Winn, 5 Pet. 233; Watkins, *ex parte*, 7 Pet. 568; McKenna *v.* Fisk, 1 How. 241; Bogardus *v.* Trinity Church, 4 Paige, 178.

[3] As to Alabama, see Pollard *v.* Hagan, 3 How. 212; as to Michigan, Johnston *v.* Vandyke, 6 McLean, 422; as to Illinois, Boyer *v.* Sweet, 3 Scam. 120; as to Iowa, Wagner *v.* Bissell, 3 Iowa, 396.

[4] *Supra*, § 20.

be said of the modifications of the common law by which a peculiar system of rights and sanctions has grown up by the unconscious action of the community in mining districts, modifications not formulated by legislation until they had emanated from the people as a customary law.[1] It is not that there were not popular agitations for a change of law, not unlike, though of course on a far smaller scale and in a far more subdued tone, the corn law agitation of Mr. Cobden. But these agitations did not really change the law but announced its changing. There were not often statutes registering such changes; when there were, these statutes, when sent to England, were usually negatived. But, nevertheless, the common law was changed. There might have been some temporary fluttering in the local courts. Of this, however, we have no reports. All we know is, that on a multitude of leading issues the common law at one epoch pointed in one direction, at a subsequent epoch in another direction. When the question subsequently arose as to codifying the law, then there was undoubtedly discussion. But with us, as in England, the changes in the common law took place without agitation, without observation, and without note.[2]

[1] See Cooley's Const. Lim. p. 26, n. 2.

[2] A striking illustration of the instinctive popular rejection of a statute is to be found in a series of decisions of courts of different states that the statute of 1 Edward VI., annulling settlements for superstitious uses, is not and never was in force in their respective jurisdictions. 2 Perry on Trusts, § 715; Hill on Trustees, p. 455, n.; Gilman *v.* McArdle, N. Y. Sup. Ct., 1883, 16 Chic. Leg. News, 17; Methodist Church *v.* Remington, 1 Watts, 218; Magill *v.* Brown, 1 Brightly R. 346, 373 (Baldwin, J.); Kehoe *v.* Kehoe, 21 Am. Law Reg. 656; Carter *v.* Balfour, 19 Ala. 814. See a valuable note by Mr. Ewell, in 22 Am. Law Reg. 661 *et seq.*, where the question is fully discussed. But why? The statute was adopted long before the discovery of America. So far as it prohibited, as it was declared by the English courts to prohibit, the endowment of Popish churches for the singing of masses for the repose of the donor's soul, it was as much in harmony with the religious views of the Protestant settlers of this country as it was in harmony with the dominant sentiment of the country from which they came. Yet our courts now tell us that the statute of 1 Edward VI. was never in force in this country. This was not by sovereign legislation or sovereign decree. The statute was not repealed by a single colony: had this been attempted the attempt would have been summarily vetoed in England. The only explanation is that this statute

That a sanctioning sovereign is not essential is illustrated in the law of nations and in interstate law in this country.

International law.

§ 26. Another illustration of the position that in law a sanctioning sovereign is not essential is to be found in the law of nations. According to the analytical theory there is no law without a sovereign, to whose edict it is imputable, and by whose sanction it may be enforced. It is further asserted that the law of nations is not a law because it cannot be so enforced, and is not so imposed. But in the United States and in England, at least, we are precluded from denying that the law of nations is a law. We have in both countries statutes declaring that certain terms are to be defined according to the law of nations.[1] We

was rejected by the settlers because conflicting with their sense of right. It was not because they desired to conciliate a Roman Catholic element in the community, for outside of Maryland there was no such element. It was because it was believed that no endowment for religious purposes ought to be declared invalid as superstitious. Mr. Perry (Trusts, ii. § 715) puts the reason as follows: "In this country, where all religious denominations, doctrines, and forms of worship are tolerated, or rather protected, so long as the public peace is not disturbed, there can be no such thing as superstitions." (See, however, Story's Eq. § 1168.) Hence it is, as we are now told by our courts, that the statute of 1 Edward VI. was never in force in this country. We have in this another case of a fundamental alteration which did not come from the sovereign and would not have been enforced by the sovereign, but which, springing from the popular conscience and sense of need, became inwrought in the common law of the land. Another illustration is to be found in the rejection of the statute *de donis*. "The principles of the common law," said Day, J., in a case before the Supreme Court of Iowa, in 1883 (Pierson *v.* Lane), "have been adopted in this country only so far as applicable to the habits and condition of our societies, and in harmony with the genius, spirit, and objects of our institutions. Boyer *v.* Sweet, 3 Scam. 121; Van Ness *v.* Packard, 2 Pet. 137; Going *v.* Emory, 33 Mass. 107; Lindsley *v.* Coats, 1 Ham. 243; Com. *v.* Knowlton, 2 Mass. 534; Wagner *v.* Bissell, 3 Iowa, 396. The direct object of the statute *de donis* was to place restraints upon alienation and create perpetuities for the purpose of maintaining a landed aristocracy. Such purpose is entirely foreign to the genius and policy of our institutions. 'The general policy of this country does not encourage restraints upon the power of alienation of land' (4 Kent, Comm. 17). We feel constrained to hold that the statute *de donis* is not 'applicable to the habits and conditions of our society,' nor 'in harmony with the spirit, genius, and objects of our institutions,' and hence that it is not in force as part of the common law of this state."

In a future section will be considered the several theories as to the way in which the common law was adopted in this country. *Infra*, § 64.

[1] *Infra*, 118 *et seq.*, 452 *et seq.*

have innumerable judicial decisions to the effect that the law of nations binds in international matters unless there is some peremptory local statute in the way. Now the law of nations cannot be said to be imposed on us by our own particular sovereign. Even if we should resort to the hypothesis that on the adoption of the constitution of the United States we accepted as binding on us the law of nations as it then was, there can be no question that since then the law of nations has been from time to time subjected to changes and modifications, and that we have accepted these changes and modifications as they have occurred.[1] They are law in the sense that we accept them as binding us, and that in matters in which it falls to us to enforce them they are enforced by us, yet these modifications of the law of nations are no more imposed by a supreme authority than were the changes in the common law of Pennsylvania, to which we have referred. Nor can it be said that the law of nations is not a law merely because it is not enforceable by execution. A country which refuses to be bound by international law would be relegated to the category of semi-civilized or barbarous countries; it would be excluded from diplomatic intercourse; the judgments of its courts would have no extra-territorial force; it would be under a ban which would exile it from the society of nations as fully as a sentence of banishment exiles a convict from his fellow-countrymen.—To say, also, that it is essential to a law that it should be enforceable by legal process is equivalent to saying that the provision in

Inter-state law.

[1] See *infra*, §§ 118 *et seq.*, 245 *et seq.* In respect to its origin the law of nations stands on the same basis of evolution as does municipal law. "The law is mutable, as every other rule resting on human authority. And a tribunal determining to-day what is property by the law of nations, is bound to take the law of nations of to-day, not that of some previous generation or previous century. It is a rule which depends for its judicial force, or for its acceptance as a judicial rule, not on the opinion of bygone nations and states, however powerful, or however wide their dominion or the form of their acts, their arms, or their jurisprudence, but on the presently continuing assent of legislating nations." Hurd, Law of Freedom and Bondage, i. § 517. This gradual modification of law is recognized in the opinion of the court in the Antelope, 10 Wheat. 114–116. "For several decades it (the international law relating to slavery) was in the process of far-reaching transformation." Von Holst's Const. Hist. (1828–46), 317.

the Federal constitution requiring a state executive to surrender a fugitive from justice is not a law because the executive cannot be compelled by legal process to make the surrender.[1] If, to proceed further, it is essential to a law that it should be enforceable by execution, then some of the most important provisions in our inter-state jurisprudence would fall out of the category of laws, and an arbitrary line of demarcation would be introduced into the constitution which would render its working impracticable. Accepting the view that a sovereign state, being incorporeal and intangible, cannot be sued or coerced at law, though its citizens may be compelled to obey the Federal laws by imprisonment and confiscation—accepting the view that the states themselves, to adopt the language of Chief Justice Chase, are indestructible[2]—then it would follow, on the theory here contested, that the Federal constitution is a mere piece of blank paper, and the indestructibility and non-suability of the state would bring with it the release of all the citizens of the state from any process to enforce Federal statutes. The emancipation of the state from legal process would involve the emancipation of the citizens of the state from legal process. But this does not follow. Though a state can neither be sued nor destroyed, yet the whole power of the union can be brought out to enforce obedience from its citizens, and the state is therefore, through its citizens, placed under the control of Federal law. This distinction is made by the constitution itself. It makes no provision for the subjection of states as such; the states, according to its terms, are unsuable and indestructible; yet it is nevertheless the supreme law of the land, and obedience can be coerced from the citizens of the states. In other words, we have in our Federal system another refutation of the position of the analytical school, that it is essential, to enable a law to bind a particular class, that it should be susceptible of execution against such class. The law of nations cannot be enforced by legal process against nations, though it may be enforced (*e. g.*, as in case of condemnation by prize courts) against the citizens of such nations, and a nation rejecting it

[1] *Infra*, § 541.

[2] *Infra*, §§ 370–381.

would be deprived of international rights. The Federal constitution cannot be enforced against states as such, but it may be enforced against the citizens of states by personal arrest and confiscation of property. Yet the law of nations is a law which is supreme in all cases where it is not modified by the local sovereign, and the Federal constitution is supreme in all cases in which its supremacy is asserted by its own courts as the final arbiters of such supremacy.—Another line of illustrations of laws existing without a political superior to impose or enforce them may be found in the case of the North American Indian tribes. There is no doubt, it is true, that these tribes, when maintaining their distinct tribal existence, and occupying their own reservations, are in a position, in respect to the United States, of independency, so far that treaties may be made with them, and their members are not citizens of the United States. Yet there is also no question that of these Indians, when occupying territories of the United States, the United States government is the absolute sovereign.[1] It can take from them their reservations; it can move them to another territory; it can, if it chooses, impose upon them its municipal laws.[2] It has not in many relations chosen to do so, for the reason that the laws fitted for the dominant race would not be fitted for Indians; but its power nevertheless remains, and is unchecked by any constitutional restriction. Yet among these tribes there are laws which their members more or less scrupulously obey. They have their distinctive laws as to marriage, most tribes authorizing polygamy; and their distinctive laws as to inheritance, all tribes authorizing adoption.[3] From the United States these laws do not proceed, nor by the United States would they be enforced. It may be said that this is also the case with the states of the Union, whose municipal laws the United States government neither imposes nor enforces. But there is this material difference: As to municipal laws in a

Law of Indian tribes.

[1] See, *infra*, §§ 265, 434, 585; Wh. Conf. of Laws, § 9.

[2] Thus the law of 1868, imposing taxes on distilled liquors, etc., was held to apply to the Cherokee Indians, notwithstanding it conflicted with the treaty of 1868 with that tribe. Cherokee Tobacco Case, 11 Wall. 616.

[3] See Whart. Conf. of Laws, § 252.

state, that state is sovereign; but as to municipal laws in an Indian tribe, that tribe is not sovereign. The laws which its members accept among themselves are laws, like those in the Asiatic communities, specified by Sir H. Maine, which the supreme authority of the country has not imposed, and would not under any circumstances enforce.

Laws which are not declaratory are inoperative

§ 27. Not only do laws thus spring from national conscience and national needs, but no laws that conflict with such conscience, or do not respond to such needs, are operative.[1] This is illustrated with singular eloquence by Burke in a passage hereafter to be more fully cited,[2] in which he says that "all human laws are, properly speaking, only declaratory;" the reason being that "they may alter the mode and application, but have no power over the substance of original justice."[3] To the same effect is a famous aphorism of Lord Bacon, that a statute indicates but does not create the law just as the compass indicates but does not create the pole.[4]

As illustrations of laws which are inoperative from repugnancy, either to the national conscience or to the needs of civilized society, may be mentioned the following:—

(1) Laws imposing religious tests against which the religious convictions of the community revolt. Such tests may be submitted to, but they do not extirpate the religious faith at which they are aimed.

(2) Laws imposing political tests. No oath has been constructed sufficiently stringent to bind the conscience in matters political; and it is an established rule in ethics, that an oath even of perpetual allegiance to a government binds only when the government imposing it is in power. Otherwise, all that would be necessary to enable an unscrupulous tyranny to perpetuate itself, would be for it to impose an oath of perpetual allegiance.

(3) Laws exacting social equality. Social distinctions are outside of the range of legislation. Legislation can neither establish nor destroy them.

[1] See *infra*, § 59.

[2] *Infra*, §§ 53, 59.

[3] Tracts on Popery Laws, cap. iii. pt. 2; Burke's Works, Bohn's ed. vi. 22.

[4] De Justitia Universali, Aphor. 85.

(4) Laws regulating currency. Could a nation be insulated from the rest of the world, then adulterated coin or irredeemable printed promises to pay might be made a legal tender, which, after a few monetary convulsions, and under the stress of severe laws punishing counterfeiting, might be made to serve as a national currency. But foreign nations would not receive such adulterated coin or irredeemable promises, nor would they be accepted by capitalists at home as investments. Such laws, therefore, would be inoperative at once as to foreign nations, who would require payment of debts due them in gold, and who would in future make sales only on a gold basis. And such laws would become, after a while, inoperative at home, through the gradual depreciation of the unreal currency until it becomes valueless.[1]

(5) Laws fixing prices. If the price is unremunerative, the thing to be sold will no longer be put on the market. If the price is too high, purchasers will not pay it, or sellers will take less than the price designated.

(6) Laws against forestalling, regrating, and engrossing; in other words, laws preventing middle men from buying up articles of trade for the purpose of selling at a greater or less profit. Such statutes were in force for many years in England, but were at last repealed as incapable of being carried into execution. The same may be said of recent statutes in respect to "cornering," except so far as such "cornering" amounts to an indictable conspiracy.

(7) Laws prescribing equal division of property. Such equal division, even if effected, could not continue in force a day. Spendthrifts would at once get rid of their shares; the thrifty would begin to accumulate.

(8) Laws establishing perpetuities. At common law, it will be seen, no limitation in perpetuity binds. It is, of course, possible to conceive of a statute creating perpetual endowment or giving perpetual privileges. But all this is on the hypothesis that the condition of things under which the statute was passed substantially continues. A provision, for instance, for the support of a particular class of persons, be-

[1] See *infra*, § 442.

comes inoperative when such class of persons ceases to exist or is materially changed. Laws, creating dominant religious establishments, when such establishments are not in harmony with the conviction of the body of the people, may be repealed without breach of faith, as was the case with the statutes disestablishing the Episcopal Church in Virginia, those in New England taking from the Congregational Church its primacy, and that by which, under Mr. Gladstone, the Church of England was disestablished in Ireland. But even without a repealing statute, a statute giving perpetual privileges ceases to be obligatory when a new condition of things comes in to which it is not applicable. The English statutes giving perpetual privileges to Roman Catholic corporations ceased to be obligatory after the English Reformation; the English statutes giving perpetual privileges to provincial governors in this country ceased to be obligatory after the American Revolution.

(9) Laws providing for legislative finality. We have already seen that laws establishing political test-oaths are inoperative. The same may be said of provisions in a law that it shall be irrepealable, or in a constitution that it is not to be amended.[1] The Theodosian edict, declaring that the laws then in force were complete and not subject to amendment or alteration, had scarcely been issued before the limitation it imposed was removed. There is not now a government in Europe, unless it be Austria, whose title is not revolutionary, and against which, if strict legitimate succession was required, a successful case could not be made out. There is no government in America that is based on unbroken legitimate succession; and the constitutional government under which we now live is, technically, as revolutionary in its relations to the confederation that preceded it[2] as was that confederation to the English crown.

(10) Laws withdrawing possessory rights. No accumulation of statutes can deprive the possessor of property of such property without process. A statute might say, "A.'s property belongs to B.," or "A.'s property shall be forfeited or

[1] *Infra*, § 368. [2] Ibid.

confiscated," but until suit on this statute against A. is prosecuted to judgment and execution by which the property is torn from A.'s hands, or A. is expelled from it, his possessory rights remain; the statutes, no matter how numerous or peremptory they may be, do not dispossess him. Possession is indestructible by legislation, however materially title may be by legislation modified.[1]

(11) Laws prohibiting self-defence. Against those very laws the right of self-defence may be set up.[2]

§ 28. It may be objected that the position that laws are on the long run operative only when in harmony with national conscience and national need, assumes an unchecked democracy changing law from moment to moment to suit its will. But so far from the two positions being interdependent, they are contradictory opposites. It is, of course, possible to conceive of a nation voting, as was the case sometimes in republican Rome, particular laws by a *plebiscite*. But even were continuous government by *plebiscite* practicable, it could not be established without destroying that gradual and tentative evolution of law which in its beginnings is unconscious, and which depends for its applicability and efficiency on the slow instinctive processes of generations. It is as impossible, in fact, to create a system of law in a day by a decree as it would be to create an oak forest in a day by machinery. It is part, as we have seen, of the theory before us that laws, unless declaratory of that which exists, are inoperative; and so far from legislation by *plebiscite* being declaratory in this sense, it would be likely from its haste, and from the temporary passions to whose influence it is open, to be subversive of the underlying law of the nation rather than declaratory of that law. The

This position does not involve unchecked democracy.

[1] Lorimer's Inst., 2d ed., pp. 259 *et seq.*

[2] *Supra*, § 5.

Burke, in his speech on conciliation with America, marshals the objections to legislation imposed by force as follows:—

1. Force is but temporary.

2. It is uncertain. "An armament is not a victory."

3. It impairs its object. Obedience forced is character depreciated.

The inference is that no law is permanent that is not declaratory of popular will. *Infra*, § 53.

fact is, the processes of national juridical evolution and of national momentary will are far from being coincident. Just as a man in a passion may in a moment ruin himself, so a nation in a passion may in a moment ruin itself. Men may be prevented from thus ruining themselves by the checks of conscience, of family affection, and by the inability to put the impulse to self-ruin into operation until cooling time has arrived. Nations, also, which, from the sympathetic force of public excitement are as likely as individuals to ruin themselves, are kept, in constitutional systems, from such catastrophes by the checks which prevent sudden popular passions from taking effect; and in no country are these checks so numerous as in the United States. The imposition of such checks preventing, as a rule, any legislation which is not merely declaratory of the settled policy and permanent conscientious conviction and sense of need of the nation,[1] is the best means not merely of producing law in its right sense, but of promoting the economical growth of the country.[2] The doctrine, in fact, of law being the outgrowth in long processes of gestation of national conscience and national sense of need, so far from being promotive of unchecked democracy, is irreconcilable either with unchecked democracy or unchecked despotism. Had the question been put to the English people by a *plebiscite* during the reign of George III., the Church of England would have had assigned to it perpetual and exclusive religious control in England and Ireland; the laws disfranchising Papists would have been made more stringent and would have been pronounced irrepealable; slavery in the West Indies and slave-trade on the high seas would have been solemnly ratified; the limitations imposed by the five acts on free speech would have been worked into the constitution as a finality; the landed interest, whose dependents formed then a majority of the people, would have placed a perpetual embargo on the introduction of foreign corn; and the old system of capital punishment for crimes, petty as well as great, would have remained unmodified. The constitution that gives

[1] *Infra*, § 362.

[2] See as to *laissez faire* system, *infra*, § 365.

play to the growth of a liberal and sound jurisprudence is the constitution that imposes the most effective checks on precipitate law making, whether by *plebiscite*, or parliamentary action, or sovereign decree. And such, in fact, is the position taken by those who have led in the advocacy of the system here vindicated. Burke, by whom the position that laws in the right sense are only declaratory was maintained with such luminous rhetoric during the whole of his career, went so far in his dread of paper legislation as to maintain that even an unreformed house of commons would be better than a house of commons which, elected by universal suffrage at some popular panic, chosen as the period for a dissolution, might override the system which national conscience and national wants had in the growth of centuries been generating. Although he argued, in his tract on the Popery Laws, religious toleration was demanded by national conscience and national need, he admitted that it might at any time be refused by a popular vote, as it certainly would then have been refused by parliament and king, and that the system of toleration gradually growing up would be exposed to destruction, especially in its incipient stage, if interfered with by speculative legislation. But such processes should not be interfered with by speculative legislation. The law should be allowed to grow by itself; the reason being that the unconscious tendencies of a Christian nation, itself an aggregation of families with the unselfishness and tenderness and industry that family life produces, are more wise and healthy than the conscious policy of its legislators or rulers, or even of its own component members meeting for popular deliberation. And so insisted Savigny:[1] "In the common consciousness of the people," he declared, "exists positive law," positive law being used by him in the sense of law which is from the return of things imposed.[2] Yet Savigny, in his dread of speculative legislation interfering with this spontaneous growth, was a conservative of the conservatives. It was this, in fact, that distinguished him and his disciples from the "theorists," as he called them, who were for estab-

[1] See *inf.* § 55.

[2] "In dem gemeinsamen Bewusstseyn des Volkes lebt des positive Recht." Syst. Röm. Recht., vol. i. p. 14. So, also, speaks Hooker. *Infra*, § 85.

lishing everywhere a system of cosmopolitan law based on what they regarded as speculative right. They, who called themselves liberals, were, he argued, the absolutists; he, who was called by them the absolutist, was, he maintained, the true liberal. His absolutism consisted in non-interference with national growth. Their liberalism, he urged, consisted in capricious and absolutist interference with such growth.

No case bound by exact precedent.

§ 29. On another point in this connection the conclusions of Blackstone are to be questioned: "How," asks that eminent jurist, "are these general customs or maxims to be known, and by whom is their validity to be determined? The answer is," so he replies, "by the judges of the land. They are the depositaries of the laws; the living oracles who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. . . . It has been uniformly considered to be the duty of those who administer the law to conform to the precedents thus (by decisions) established." If exact conformity to a precedent be required as a prerequisite to a decision, then no case could be decided, since no case is precisely the same as any prior case that has been adjudicated. If all that is meant is that no point of law that arises shall be decided in any other way than in accordance with precedent, to this the replies are: (1) there are innumerable new social and economical conditions which require rulings for which there are no precedents; (2) as a matter of fact, of the rulings now made in the courts of England and of the United States, by far the greater number are, as elsewhere stated, more or less departures from the common law rule; since there can be no judicial affirmation of an old precedent "without putting something more into it, and fixing, as it were, a new starting-point."[1] Common law precedents, in fact, are only binding on superior courts, so far as they are consistent with the conscience of the community and the need of the times. When they are in permanent conflict with either, they cease to bind.

§ 30. As has been well said,[2] judge-made law is superior to

[1] Pollock's Essays (1882), 231.

[2] See London Spectator, June 9, 1883, p. 740.

statutory law in the skill and persistent caution and circumspection with which it is prepared. It seems almost impossible to prevent bills amending the law from being tinkered, on their progress through the legislature, in a way that sometimes impairs, sometimes perverts, sometimes destroys their effect. An amendment, apparently plausible, is sprung on a bill at a late hour, and is accepted without due consideration; and the consequence is that the act, as has been the case with several important English statutes, does not work, or works even mischievously. Undoubtedly from the legislature must come revolutionary changes in the law, such as make a catastrophic transition from one era to another. But, when the change is one of logical evolution, it is likely to be done far more accurately by the judiciary than by the legislature. The principal difficulty in the way of the acceptance of this position is that the nature of the duty is not always fully recognized. Courts are too apt, even when they are tearing up the common law by the roots, to declare that they are simply restoring it. But applications of germinal principles of justice to an advanced civilization are no more revivals of such principles in their rudimentary conditions than is the horse, that, by the gradually cultivated instincts of a long line of descent, has acquired docility and dexterity in answering the wants of man, the revival of the wild horse of the desert. As with animal, so with juridical growth, that which is inconsistent with surrounding conditions is set aside, that which is adapted to surrounding conditions survives. The peculiarity of juridical evolution, however, is this, that while animal evolution works itself out without human agency, juridical evolution is worked by the agency in part of jurists and text writers, in part of legislatures, in part of courts. It is by the courts, however, as we have seen, that the work is mainly effected; and, perhaps, the chief difficulty in the way of the work being thoroughly done is that those doing it are not always aware of the important mission in which they are the necessary co-workers. Too often we still hear, even from judges of the highest courts, that judges cannot be legislators; and too often this is the reason given for the pushing, even to conse-

Necessary logical evolution by courts.

quences to which it does not legitimately extend, some rule which should be thrown overboard as obsolete. Judges are not legislators for the purpose of revolutionizing the law, but they are legislators for the purpose of evolving from it rules which should properly govern present issues, and winnowing from it limitations which are withered and dead. And when this duty—a duty which is a necessary incident of judicial office—is frankly recognized by the judiciary, the process of legal development and of supersession will be carried on much more effectively and wisely than it can be done by those who shut their eyes to the duty. For no disclaimer can relieve the judiciary from the function of gradually modifying the law, both by adaptation and rejection. So absolute is the necessity that the very statutes which are passed to correct the action of the courts require the action of the courts not only for their execution, but for their construction.[1]

[1] That slavery was abolished in England, not by statue, but by judicial decision, see *supra*, § 20.

The English Parliament, to take another illustration, determined, in the reign of Henry VIII., to stamp out all settlements by which the legal title should be in one party, and the beneficial enjoyment in another party. For this end the statute of uses was passed; but this end the statute of uses did not effect. Such settlements are the necessary incidents of all civilization in communities where the helpless need support, and the kindly and liberal are determined that the support shall be extended. It was necessary that such support should be sanctioned by the courts; and though this could not be done in a way which the legislature specifically prohibited, it could be done in a way to which that prohibition did not technically reach. Hence it was held that the statute neither "executed" a "use upon a use," nor a "trust." All that was necessary, therefore, to give the beneficial enjoyment of an estate to a person not holding the legal title was, in defiance of the legislative prohibition, to add a word or two to the limitation by which the settlement was made. The needs of the times, and the genius of a humane and generous people, required the establishment and sacred application of trusts. And trusts were recognized and sheltered by the courts under the very guns of a statute that parliament enacted to destroy trusts. Estates tail, also, as we have seen (*supra*, § 22), were unfettered by a fiction created to meet the demand for greater freedom in the transfer of land (see Taltarum's Case decided in the reign of Edward IV.); and the absolute freedom of devise was gradually secured. (See 1 Steph. Com. 593.) Equity was instituted as essential to the removal of the asperities of common law when the judges of common law courts refused to mould the law so as to conform to the spirit of the age; and now equitable doctrines in cases of conflict being imposed on or accepted by the

§ 31. It may be objected to this view that it makes the administration of justice dependent upon caprice. To this,

common law courts, equity as a distinct system has disappeared.

"The justices of the two benches (King's Bench and Common Pleas) were permitted, by their solemn decisions framed *pro re nata*, and recorded in their respective courts, not only to declare the law where doubtful or where no law before prevailed, but also to accommodate the law to the altered state of society, until, by "succession of precedents, a system of law suited to the exigencies of society had been completely established." Spence, Laws of Mod. Europe, p. 555. Thus, as is stated by Mr. Smith in the introduction to his Mercantile Law, the law with regard to bills of lading was originated by Lord Holt in Evans *v.* Marlett, 1 Ld. Raym. 271.

As further instances of modifications of law made necessary by change of political conditions, may be noticed the modifications of personal rights produced by English recognition of naturalization. Lawrence, Com. sur Wheat., iii. 48.

Mr. Austin, in a note at the end of his fifth lecture, says: "I by no means disapprove of what Mr. Bentham has chosen to call by the disrespectful and, therefore, as I conceive, injudicious name of judge-made law. For I consider it injudicious to call by any name indicative of disrespect what appears to me highly beneficial, and even absolutely necessary." See, as to Mr. Austin's views in detail, *infra*, §§ 91 *et seq.*

Judge Stanley Matthews, of the Supreme Court of the United States, in his address in 1882 before the N. Y. State Bar Association, after quoting Burke's statement that all human laws are, if operative, only declaratory, speaks as follows: 'The quick movements of society do not always wait upon the slow processes of legislation. If a new and useful device is invented, that seems calculated to serve a beneficial public purpose, it is adopted and brought into use through the energy of private enterprise, without previous inquiry as to what its legal *status* may finally be determined to be. And with the backing of its own utility and the interested opinion thus created in its favor, it takes its place and fights its way, against the opposition of existing interests and prejudices, to a judicial recognition of the rights and obligations which arise by reason of it. The introduction of the systems of telegraphs and street railroads exemplifies and illustrates this process. And see how rapidly and completely the unique local customs of rough and illiterate miners establishing themselves without previous legislative authority upon public lands became judicially recognized as giving rise to legal rights and obligations before they were confirmed by statutory enactments. It has been so from the beginning. How very small a part of the existing body of our common law owes its origin to any express legislative authority! The whole large body of that refined system of rights and obligations, which constitutes the law of common carriers, is founded on the custom of the realm when transport on land was on horseback or by wagon, and which, from the decision of Lord Holt, in Coggs *v.* Bernard, has been expanded to meet the demands of carriage by land and sea, not then dreamed of. The *lex mercatoria* has been developed out of the early usages of merchants, when trade and commerce were in their infancy, into a

however, it may be replied, that inferior courts, under this view, are as much bound by precedent as they are under the

consistent body of rules, which govern communities the most widely separated in space and manners, and regulate transactions which represent the accumulated wealth of the world at a time when millions are as familiar as hundreds were to our forefathers, whose traditions we have inherited and enlarged. Legislation, in the mean time, has introduced into the body of the law few, if any, new principles, but has not been idle in improving the machinery of administration."

This position is further sustained by the following passage, cited from Kent's Commentaries, adopted by Judge Thompson, in Wheaton *v.* Peters, 8 Pet. 669: "The common law includes those principles, usages, and rules of action applicable to the government and security of the person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature. A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received from time to time the sanction of the courts of justice without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases."

"Multiplying positive rules to any extent, is also to multiply occasions for judicial interpretation; to whatever limit legislation may be carried, beyond will be found an undefined region which must remain open to the occupancy of the courts. However large the sphere which may be filled by positive laws, the common law is an exterior and circumambient medium; it also pervades the very body of them, and is the agent which gives vitality, activity, and energy to their provisions." Second Report of Pennsylvania Commissioners of the Civil Code, Messrs. Wm. Rawle, T. I. Wharton, and Joel Jones, presented in 1832.

As authorities affirming the elasticity of the common law and its variation with successive varying conditions, see Wallworth *v.* Holt, 4 Myl. & C. 695; Norway Plains Co. *v.* R. R., 1 Gray, 263, 267; Lyle *v.* Richards, 9 S. & R. 322, 351; Whart. Cr. Law (8th ed.), § 14.

The views in the text are disputed, with his usual peremptoriness, by Sir J. F. Stephen, 3 Hist. Cr. Law, 360, who announces that a finality in judicial exposition has now been reached. "A new state of things has come into existence. On the one hand, the courts have done their work; they have developed the law. On the other hand, parliament is regular in its sittings, and active in its labors; and if the protection of society requires the enactment of additional penal laws, parliament will soon supply them. . . . Besides, *there is every reason to believe that the criminal law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace, and for the property and persons of individuals that they are likely to require under almost any circumstances which can be imagined.*" The opinion in italics will probably be regarded by another generation as about as correct as we now regard the opinions as to the perfection of the law in their own time expressed by Lord Eldon and by Blackstone. The question between Sir J. F. Stephen and the advocates of the views expressed in the text, it must be remembered, is a question between two widely diverging schools, one asserting that the law is susceptible of fixity

view that the law is unchangeable. It is only when we reach courts of the last resort that the two systems may be supposed to clash. But there is really no clashing. It is agreed on both sides that by such courts old precedents may be set aside when no longer reasonably applicable. But in obedience to what rule is this done? Whenever, such is the answer, an old rule is found no longer applicable, then the judges may declare such rule to be no longer in force, and announce another in its place. Certainly this view is more open to criticism than is the view which makes the action of the judges necessary to a modification of the common law rules, but bases that action on the national conscience and need. In the one case it is discretion exercised without reason, in the other, with reason. And, after all, it is on national conscience and need, in the sense in which these terms are here used, that we must fall back in any case as the arbiter by which law is to be framed. To these arbiters we necessarily owe our statute law. It is not strange, therefore, that the common law should be held to consist of maxims and judicial decisions thus moulded. Precedents are of immense value as guides for future action. But they are prophecies more or less precise as to future law, and not absolute arbiters of what that law shall be. This last office they cannot assume, (1) because law, like all other sciences, is the subject of evolution; (2) because as the circumstances of a people change its laws must change; and (3), because there is no precedent that exactly fits any subsequent case.

This view not open to objection of arbitrariness.

§ 32. It is, however, objected that "judicial legislation," as the judicial modification of a common law rule is called, is *ex post facto;* and this objection, at least in those cases in which there is a constitutional prohi-

Nor is such law *ex post facto*.

and finality, and the other asserting that from the nature of things it is mutable and elastic, varying with the conditions under which it exists. If we follow Sir J. F. Stephen's view that each new phase of law is to be settled by the legislature, then the legislature would supersede the judiciary, since there is no new case that does not involve a new phase of law. It is an interesting fact, that almost simultaneously with the appearance of Sir J. F. Stephen's book, came Lord Coleridge's ruling in Foote's Case, establishing an entirely new rule in blasphemy. *Supra*, § 22.

bition of *ex post facto* laws, would be fatal if such judicial action is the application to prior cases of a rule previously unknown. But that a judicial decision rules a prior case is plain, since without a prior case there can be no decision. What saves such judicial decisions from being *ex post facto*, is the fact that the law they announce is not new, but is the customary law of the community not yet formally expressed.[1] The courts, for instance, rule that a particular case is governed by a custom which, till that period, had not been made the basis of a decision; the custom is proved, we may suppose, as a fact, or it is one of which the court takes judicial notice. Now the court does not say that it makes the custom law. It says that the custom was law at the time of the happening of the litigated case. It is true that this view is strenuously opposed by Mr. Austin,[2] but the rulings that such affirmations of customs declare such customs to have previously been law, are innumerable, and are right in principle. For, as Savigny shows, a local custom is part of a contract which is made subject to it; and when a court determines what a contract or other business transaction means, the court at the same time determines the law to which the parties intended to subject themselves. It is not "this law we make now," but "this is the law which the parties themselves made as part of their contract." And what is thus said of customs is said of all other laws accepted by the community, but not yet formulated in statute or judicial decision.

Evolution not of itself antagonistic to free-will or to theism.

§ 33. It may be objected, also, to the doctrine of juridical evolution, as above stated, that it is part of a system of philosophy which asserts the inexorable and unvarying process of physical law, and which ignores the existence of a superior being by whom human events are controlled. What may be the opinion on these points of the eminent men who are the chief exponents of evolution in England, it is not necessary to inquire; though it may be incidentally remarked, that among them are some

[1] See *supra*, § 22, as to Lord Coleridge's rulings on this point in R. *v.* Foote.

[2] *Supra*, §§ 14–15; *infra*, §§ 56, 91 *et seq.*

who are among the stoutest vindicators of theism, and that evolution no more by itself weakens the proof of a divine creator and organizer, than does a clock that goes for a year disprove the existence of a watchmaker which a clock that goes for a day might be admitted to establish. It is enough to say that the doctrine of juridical evolution was taught long before that of physical evolution came prominently before the public eye;[1] and that the truth that the "fit" must from the nature of things survive the "unfit," was, as we have seen, announced and defended by Burke, Savigny, and Puchta, long before these terms were made familiar to us by the great English scientists who are supposed to have inaugurated a new school. What Burke and Savigny argued was that a law of which a people has no need, and of which the national conscience does not dictate the continuance, will die out, and be displaced by a growth more congenial to the soil and more needed by the people by whom the soil is cultivated. What may be needful, in other words, in one community, may not be needful in another; the custom which the peculiarities of one country may foster, in another country will be intolerable; in this way distinct nationalities will have their own jurisprudences, in each nationality that which is unfit dying out, and that which is fit surviving. But by these eminent thinkers it was also declared that there is no inexorable law, physical or spiritual, binding either men or nations to specific destinies, but that with nations, as well as with individuals, spontaneity is the basis of growth. There is development: the goal of yesterday in jurisprudence is the starting point of to-day; but it is development which, whether individual or national, is self-elective. Nor is the objection that this system is antagonistic to theism entitled to greater weight. It is remarkable that by no one is the doctrine that law emanates from the people taught with greater emphasis than by a great English teacher, who is as much distinguished for his devotion to the Christian faith as for his lofty and catholic philosophy. Reason and revelation, so declares Hooker, are co-ordinate factors, and all law relating to mu-

[1] See *supra*, § 6.

table objects is mutable in accordance with the requirements of reason. And among the materials reason invokes in determining how far law is to be affirmed or modified, are national conscience, national aptitudes, and national customs adopted either consciously or unconsciously. That a nation evolves its laws in subordination to its own sense of right, is, he holds, in entire consistency with a scheme which assumes that this sense of right is divinely implanted, either directly or through a written revelation; and which, after such laws have thus been produced, assumes that they are open to be affirmed or modified by formal legislation.[1] Nor is such a process any more inconsistent with a comprehensive and wise scheme of divine government than is the leaving local affairs to local option inconsistent with a comprehensive and wise scheme of human government. "When a thing ceases to be available unto the end which gave it being," so declares Hooker,[2] "the continuance of it must then of necessity appear superfluous." Thus, under the influence of "environments," such is the drift of his exposition, laws which affect society in its mutable relation can grow up when of use, and when useless vanish. And he proceeds boldly to declare, in opposition to the Puritans, that it is part of the divine economy that there should be a gradual growth of law governing man. Change, in adaptation to the growth of society, is one of the features that even the divine law in this relation incorporates in itself. It is a law "requiring," as Hooker expresses it, "itself to be changed."[3] It is, therefore, a law, in its human aspect, not of immobility, but of evolution.[4]

[1] See *infra*, § 60.

[2] See Ecc. Pol., Book III. ch. x. § 1.

[3] Ib. Book III. ch. x. § 5.

[4] The only system of secular law which the New Testament can be said to sanction, is law which is the product of secular conditions. "The exclusive pretensions of the theological school of jurisprudence," says Professor Lorimer (Institutes, 2d ed. 41), "are specially inexcusable in Christian countries, seeing that Christianity, as a learned and ingenious Frenchman has observed, is 'the first religion which does not pretend that law is dependent on it.'" De Coulanges, Cité Antique, p. 518. The Roman law was in force in Judea when Christ lived, and is the only law distinctly recognized by him as binding; and the Roman was at that time a law in the process of evolution from custom to code.

§ 34. It does not follow, however, from the position that law is thus gradually produced, that this process is one of fixed and unbroken advance. On the contrary, we find innumerable instances in which the courts, conscious that a false step has been taken, go back to the point of error, declare the character of the mistake, and then take another path in what appears to them the right direction.[1] This is what is called "overruling" a prior case; and the volumes in which these overruled cases are noted exhibit to us over how large an area this process of retreat, revision, and advance extends. Evolution in law, in other words, is, as has been said of evolution in other sciences, undulatory; it does not proceed in a straight line; it curves and swerves to allow for obstacles by which its movement in a straight line might be blocked.[2]

Process does not preclude occasional receding and revision.

§ 35. We shall have occasion to observe hereafter that in England, by statute, the old conflict between law and equity has ended by the prevalence of equity over law.[3] It is interesting here to notice that as the antagonism of equity to law was a consequence of the condition of things in the earlier days of English jurisprudence, so its prevalence is a product of a more liberal civilization. In all primitive communities the forms of law are hard, and the terms in which contracts are to be constructed are narrow and exclusive. This was the case in the earlier stages of the common law. To mitigate this harshness the king, through his chancellor, in meritorious cases intervened. Gradually a system of equity in this way grew up to

"Prevalence of equity" in like manner "evolved."

[1] See Dalby *v.* Ass. Co., 15 C. B. 365, overruling Godsall *v.* Boldro, 9 East, 72.

[2] *Supra*, § 14; *infra*, § 61. As an instance of the fluctuation attending the process of assimilation of English law may be noticed the reception met with in Pennsylvania by the statute *quia emptores*. The judges leave it out of their report of statutes in force in the commonwealth. Judge Brackenridge, in Dorsey *v.* Jackman, 1 S. & R. 42, declared, in 1814, that it never had been in force in Pennsylvania. In 1863, Judge Read, afterwards chief justice, in a lecture before the alumni of the Law Department, after an elaborate survey of the legal history of the state, said: "I think it has been clearly shown that, at least, its principles have been adopted by the people and the courts of Pennsylvania."

[3] *Infra*, § 113.

which the courts of common law succumbed. A chancellor might enjoin an action of a common law court in a particular case, but the common law judges knew that the injunction would be granted in such a case if due cause was shown, and that it was part of the common law that the common law should submit to an injunction so granted. On the other hand, in questions as to which the common law was supreme (and between the two systems a common line of demarcation was accepted by both), the chancellor received as absolute what the common law courts said, and regarded as final the answers of the common law courts on questions submitted to them for determination. The antagonism between equity and law, therefore, was merely nominal and illusory; and even this nominal and illusory antagonism was in many jurisdictions in this country never accepted, while in England it has now ceased to exist. In the distinctive domain of common law equitable doctrines have now by statute been enthroned; and a common law judge, instead of sending suitors to courts of chancery to obtain equitable relief, now administers this relief himself, either by using, when necessary, equitable process, or by applying equitable remedies through common law forms. Equity evolution, then, has three stages: (1) the overruling of archaic rigidity of form by the interposition of royal prerogative through a chancellor; (2) the development of a system of equity, nominally antagonistic, but really coordinate, to which the common law courts bowed; (3) the sweeping away of the pretence of antagonism and the adoption of equity as a component part of a symmetrical system of national law.[1]

Admiralty law is the law of the sea.

§ 36. Admiralty law is the law which governs matters exclusively relating to the sea, and in England is administered by the Lord High Admiral, or his deputy, who is the judge of the admiralty court; in this

[1] "The province of equity," says Judge Strong, in an address on the growth of law (Phila. 1869), "was soon enlarged, and it has continued to expand until the present day. . . . This development has not been the offspring of legislation. It is the creation of judges, submitted to by legal tribunals, because it commends itself to their moral sense, and because it has been found conducive to the highest welfare of society."

country by the judges of the district courts of the United States. These courts have exclusive cognizance of litigation as to seamen's wages, and as to prizes, as well as jurisdiction of all causes of action arising or to be performed on the sea. The proceedings are peculiar to these particular courts, being built on the practice of the civilians, and not following that of the common law. The law adopted is a system by itself, being in a large measure international, the sea being common to all nations, and maritime questions, whenever arising, calling for a common standard of adjudication. The authorities, on which maritime law as an international system rests, consist of the decisions of the English admiralty courts, and of our own courts having admiralty jurisdiction; of portions of the Roman standards, which are themselves based on the Rhodian laws framed under Greek auspices; of approved treatises on the topic, French, German, and English; and of the usages of the sea, of which, when notorious, the courts take judicial notice, but which, when not notorious, or when not as yet approved by judicial action, must be proved as matters of fact. In particular regions, it should be added, specific rules were for centuries operative, and acquired the force of law; on the western coast of the continent of Europe the code of Oleron, on the northern coast that of Wisly, on the coasts of the Mediterranean and afterwards generally for the whole continent, that of the *consolato del mare*, issued, probably, in Barcelona before 1400. In northern Germany the rules adopted by the Hanseatic Conference were regarded as peculiarly authoritative. Subsequently, in the 16th and 17th centuries, special ordinances on this topic were issued in France, the Netherlands, and Sweden; and statutes in the same line were from time to time adopted in England, some of which have been enacted in the United States. The most comprehensive and judicious recapitulation of the law, as existing in Europe, is now to be found in the French *Code de Commerce*, which has been substantially reproduced in the German *Handelsgesetzbuch*.[1] The distinctive law of the United States will be found in our revised statutes, and

[1] See Holtzendorff, Ency. (1882), i. 626.

in the decisions of our courts of admiralty. Under the Federal constitution the words, "all cases of admiralty and maritime jurisdiction," which are given to the Federal courts, have been construed to mean the distinctive admiralty and maritime jurisdiction as exercised by the English maritime courts, though with a sphere of operation which our national conditions make more wide.[1]

Martial law is the law by which armies are governed.

§ 37. Martial law is the law by which persons engaged in military service are governed in respect to such service. Courts martial are the tribunals by which such law is executed. "Martial law," says Chancellor Kent, "is quite a distinct thing from military law, and is founded on paramount necessity and proclaimed by a military chief."[2]

[1] U. S. *v.* Magill, 4 Dall. 426. See *infra*, § 523; see Cohen's Adm. Law, 1883.

[2] Kent's Com., i. 377. "I contend that martial law is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all; therefore, the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules, and regulations, and limits, according to which his will is to be carried out. Now, I have, in another country, carried out martial law—that is to say, I have governed a large proportion of the population of a country by my own will. But then what did I do? I declared that the country should be governed according to its own national law, and I carried into execution that, my so declared will."—Speech of Duke of Wellington on Ceylon question, quoted in Field's Code of Int. Law, § 724. See Halleck's Int. Law, § 25.

"Martial rule is justifiable only by an absolute and overruling necessity. When such necessity exists, the rule may be exercised, without a previous proclamation, and in any place actually possessed by a belligerent, whether an enemy or friend (see Bluntschli, Droit Intern. Codifié, § 539; Lieber's Instructions, ¶ 1), but in no other place; and it is always exercised at the peril of the commander." Field's Code of Int. Law, § 725.

"If there be an abuse of the power so given, and acts are done under it, not *bona fide* to suppress rebellion or in self-defence, but to gratify malice or in the caprice of tyranny, then for such acts, the party doing them is responsible. Forsyth's Cases and Opin. in Const. Law, p. 214; and see Finlason's Commentaries on Martial Law, London, 1867. Military necessity includes all those measures which are indispensable for securing the ends of the war, and which are not forbidden by this code, or the military law of the power by which the measures in question are taken. See Lieber's Instructions for the Government of Armies of the United States, ¶¶ 6, 7.

"Interference of the military power with the persons or property of others than those impressed with the military character, actually engaged in unlawful hostilities, or spies, or pirates, when

§ 38. Military law, in old times, was understood to be the law expounded by courts of chivalry, which, under the statute 13 Richard II., had "cognizance of contracts touching deeds of arms out of the realm, and also of things which touch war within the realm,

Military law is the law applied by a military commander to

called in question in the civil tribunals, can only be justified on the ground of a danger immediate and impending, or a necessity urgent for the public service, such as will not admit of delay, and when the action of the civil authority would be too late in providing the means which the occasion calls for." Harmony's Case, 13 How. 115.

A person in military service of the United States, tried and sentenced by a court martial having jurisdiction, cannot be released by a *habeas corpus* from the Supreme Court of the United States. Mason, *ex parte*, 105 U. S. 696.

"In our opinion," says Waite, C. J., "the 58th and 59th Articles of War have no application to the case. The 58th is as follows: 'In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the state, territory, or district in which such offence may have been committed.' The object and purpose of this article were elaborately considered in Coleman *v.* Tennessee, 97 U. S. 509. As it is to operate only in time of war, it neither adds to nor takes from the powers which courts martial have under the 62d article in time of peace. Article 59th is as follows: 'When any officer or soldier is accused of a capital crime, or of any offence against the person or property of any citizen of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs, are required, except in time of war, upon application duly made by or on behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.' It is not pretended that any application was ever made under this article for the surrender of Mason to the civil authorities for trial. So far as appears, the person injured by the offence committed was satisfied to have the offender dealt with by the military tribunals. The choice of the tribunal by which he is to be tried has not been given to the offender. He has offended both against the civil and the military law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction."

territory occupied by him.

which cannot be determined or discussed by the common law."[1] According to Blackstone, the "civil jurisdiction of this court of chivalry is principally in two points: the redressing injuries of honor, and correcting encroachments in matter of coat armor, precedency, and other distinctions of families." These courts, obsolete in England, have never been known in this country; and with us the term military law is applied to the law administered by a military governor in command of a country temporarily occupied by him, and in which the power of the civil authorities is suspended. The municipal law of a country under occupation by a hostile military force remains in operation, in matters as to which no question of public or military policy is involved, until superseded by the military authorities in command.[2] Except as a war measure, during the pendency of war, a civilian cannot be tried by a military court.[3] The term "military law" is also applied to the system of regulations prescribed for the government of the military forces of the state.[4] The distinction made in the text, however, between military and martial law is one not always observed. By some high authorities, for instance, the term "martial law" is applied to military rule imposed upon an entire country in cases of extreme necessity by its governing powers, involving a temporary suspension of the constitution of the land.[5] According to Lord Chief Justice Cockburn, in his charge in Eyre's Case, the term "martial law" is used in the following senses: 1. As "law martial," which was the law "exercised by the constable and marshal over troops in actual service." 2. In the old law this was extended to the rules governing the military when called out for breaches of the peace. 3. The scheme of government laid down in the Mutiny Act. 4. "The

[1] See 2 Curtis's Life and Works, 327.

[2] Whart. Cr. Pl. and Pr., 8th ed., § 979 n.; Wingfield *v.* Crosby, 5 Cold. (Tenn.) 241. And in 12 Opinions of U. S. Attorneys-General, p. 128, it was declared that a citizen not in the military service cannot be tried by military commission in Washington for an offence committed in New York, within the jurisdiction of the civil courts, which were in full possession and exercise of their powers. See *infra*, § 212.

[3] Milligan, *In re*, 4 Wall. 2.

[4] Halleck, Int. Law, 373; Martin *v.* Mott, 12 Wheat. 19; Mills *v.* Martin, 19 Johnson's R. 7.

[5] 1 Steph. Hist. Crim. Law, 207.

common law right of the crown and its representatives to repel force by force in the case of invasion or insurrection, and to act against rebels as it might against invaders."[1] It was this right that was invoked by Mr. Lincoln, at the time of the late civil war, in the arrest of members of the Maryland Legislature who were proposing to adopt an ordinance of secession. "I may sum up," says Sir J. F. Stephen,[2] "my view of martial law in general in the following propositions: 1. Martial power is the assumption by officers of the crown of absolute power, exercised by military force, for the suppression of an insurrection, and the restoration of order and lawful authority. 2. The officers of the crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent, and in any manner, that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable, civilly or criminally, for such excess. They are not justified in inflicting punishment after resistance is suppressed, and after the ordinary courts of justice can be reopened."[3]

[1] Ibid. pp. 207–8.

[2] Ibid. p. 215.

[3] To this is cited Wright *v.* Fitzgerald, 27 St. Tr. 765. To the same effect as to the limits of such suspension of "the ordinary courts of justice," see Milligan, *In re*, 4 Wal. 2, cited *supra*. See *infra*, §§ 213–216.

CHAPTER II.

THEORIES AS TO SOURCE OF LAW.

Importance of question involved, § 42.
Views of Socrates and Plato, § 43.
Aristotle, § 44.
Cicero, § 45.
Grotius, § 46.
Hooker, Bacon, and Hobbes, § 47.
Pufendorff, § 48.
Spinoza, § 49.
Locke, § 50.
Montesquieu, § 51
Blackstone, § 52.
Burke, § 53.
Kant, § 54.
Savigny, § 55.
Bentham and Austin § 56.
Views of James Wilson, Herbert Spenc
Inclination of authority the product of natio and need, § 59.
Conscience is not an i sense, but a combinat right with reason a and traditional tende
Custom the intermediat
Primary law-making un
Authority may call for limits authority, § 63.
Common law in this co duct not of conquest, tion, but of adoption,

Importance of question involved.

§ 42. THE question of the origin of law is one of as well as of interest. Not only is the a law largely due to the source from wh nates, but to that source we must ofte course for its interpretation.[1] If law is to social contract, then we must discover what th is. If it is imputable to sovereign decree, the inquire what was the sovereign's intentions, and sovereign was. If, as is here maintained, it is ir the conscience and needs of the nation as a contin cal existence, then for the interpretation of the la trace the history of the nation and scrutinize the political conditions under which it has grown and It is proposed, at present, briefly to notice some o prominent views which have been advanced in this important question.

[1] *Infra*, § 64.

§ 43. According to Socrates,[1] virtue is the basis of obedience to law, and law he classifies (1) as political, (2) as moral, and (3) as divine.[2] Plato idealizes the law as righteousness. The soul, he holds, contains three elements: (1) virtue, (2) wisdom, (3) courage, or force. In like manner the state contains three elements: the governing, the warring, and the producing. The first controls the third by aid of the second. Each member of the community has his allotted duty; and unrighteousness consists in the non-fulfilment of such duty. The state is the product of necessity, and happiness the product of law, but law to have this result must meet the wants and correspond with the views of the society from which it emanates, and which it controls. Impracticable, no doubt, are some of the conditions of this ideal state, *e. g.*, community of goods and of families; and fatally defective is Plato's system in making knowledge of what is right and not law the basis of society; yet we cannot but feel that he has anticipated, in some respects, the views of Savigny and Burke in making the value of law to consist in its adaptation to the community it is to control, regarding it not as making, but as being made by society. It is true that he is not constant in this view, and in his essay on Law, law is sometimes regarded as the foundation of righteousness, not righteousness as the foundation of law. But even here he falls back on the great principle that law is only efficacious when in harmony with the condition of society, and, that to make righteous laws righteous, principle is the pre-essential.

Views of Socrates and Plato.

§ 44. Aristotle, in his treatises on Ethics, discusses law at great length, but does not undertake to trace its origin. It is enough for him, as it is enough for Blackstone, that law should be defined as imposed by authority, without inquiring what that authority is. Happiness, he tells us, is the object of society, and happiness can only be purchased by the exercise of that virtue of which

Of Aristotle.

[1] In the analysis of the authorities here cited I am greatly indebted to Dr. Geyer's introductory essay in Holtzendorff's Encyclopädie, 4th ed. 1882.

[2] As to Lord Mansfield's view of Socrates, see *infra*, § 59.

righteousness is an essential element. Righteousness, *i. e.*, the performance of that which is right, consists in its larger sense in the conformity with moral as well as positive law. In a narrower sense, righteousness consists in justice, so that every man shall have his equal opportunities of happiness in the eye of the law. *Distributive* justice is therefore to be based on worth. It is otherwise with *retributive* justice. If a wrong is done, it is to be condemned irrespective of the character of the wrong-doer. In his treatise on Politics, of which only a part is preserved, Aristotle discusses the origin of the state. The insufficiency and unsatisfactoriness of a merely solitary life lead to the formation of the family; the necessities of the families to the grouping in village communities; the necessities of these communities to the building up of the state. The state, the result of necessity, is from the nature of things to be so organized as to produce happiness. He follows Plato, also, in dividing the population into an aristocracy of the intelligent and educated, who constitute the citizens, on the one side, and peasants and mechanics on the other side; the former governing the latter, but for the good of the whole. But the complicated system of laws he suggests shows that the legislation he has in view is legislation *a priori*, not legislation such as emanates from the sober deliberations of the people as a body. He recommends compulsory education, compulsory division of labor, compulsory checks on over accumulation and over speculation.

Of Cicero.

§ 45. Cicero, in his treatises *De Legibus* and *De Republica*, does not undertake to give a distinct scheme of his own. The *jus naturale* should guide in the formation of positive law, yet *utilitas* must prescribe numerous rules which the *jus naturale* would not by itself prescribe. Positive law is divided into the *jus gentium*, common to all nations, and the *jus civile*. He follows Aristotle in tracing the origin of the state to necessity, and making the object of the state to be the promotion of happiness and the establishment of virtue. This, he thinks, can be best done by a mixed system such as his ideal republic of Rome, but done it must be. In other words, law, the product of social necessity, is to regulate all action, repress all evil, and enforce all good. These opinions of Cicero were

caught up and quoted by the enthusiasts who sought in the early stages of the French Revolution to regenerate the world through a complex and exhaustive code by which, under the name of liberty, all liberty would be destroyed. Burke's sagacious criticism on this system will be hereafter given.

Of Grotius.

§ 46. Grotius was the first great writer on the philosophy of law after the middle ages; and his work (1625), though by its title (*De jure belli ac pacis*) limited to international law, opens a new epoch in jurisprudence. He takes the ground, which is essential to any logical system of international law, that it is not necessary to the authority of a law that it should be imposed by legislature or prince. What is reasonable is just, and supposing there is no statute or custom or precedent in the way, must be so ruled to be when a litigation presents the issue for decision. "Jus est, quod injustum non est. Injustum autem est, quod naturae societatis ratione utentium repugnat." He errs, however, as we will see, in assigning the origin of the state to a social contract, and he errs still more in holding this contract irrevocable, unless in cases of *summa necessitas*. The people, indeed, he maintains, hold the *imperium*, but this is *non exercendum a corpore, sed a capite*. Divine revelation is not to be regarded as establishing human law. Human law is to be determined by human reason, but by reason exercised by the state through its duly appointed authorities.

Of Hooker, Bacon, and Hobbes.

§ 47. As will be seen hereafter, Hooker and Bacon, while differing in details, agree in the main in holding that as men or nations advance from stage to stage in cultivation and civilization,—as, in point of fact, each generation has experience and knowledge superior to the past, and adds new increments to the past as a basis,—law, which adopts itself imperceptibly to national needs and conscience, is mutable *pari passu* with the community from which it emanates.[1] Hobbes, also, as the founder of what is called the analytical school of law, is elsewhere considered.[2] The natural condition of mankind, he argues in his Leviathan (1642), is one of war. Each man's hand is lifted against his

[1] *Infra*, § 86.

[2] *Supra*, § 6; *infra* §§ 90 *et seq.*

neighbor, and the only escape is by treaties or compacts by which the aggregate force of those thus contracting is placed in the hands of one absolute chief. This sovereign is to be supreme over church as well as over state; it is his duty to do what is best for his subjects, but his subjects cannot compel him to do his duty. Law, therefore, has its origin in fear. This fear, however, calls for a sovereign, and a sovereign, to be efficient, must be autocratic; though this point is admitted to be open to modification in countries whose traditions require parliamentary institutions. From the sovereign, as is shown elsewhere in our discussion of the analytical school, to which Hobbes gave the earliest impulse, all law is derived; for, though there may be a sovereign without law, there can be no law without a sovereign. If it be objected that the common law does not emanate from the sovereign, the answer is that the sovereign does not order, he permits, and thereby sanctions.[1]

Of Pufendorff.

§ 48. Pufendorff, partly in reply to Hobbes, published, in 1672, a treatise called "De jure naturae et gentium," in which he developes more fully Grotius's position that the state is based on the social instinct, differing, however, from Grotius in making, according to the criticism of Geyer, this instinct to spring, not from kindliness, but from egotism. In a state of nature men are at peace, and endowed with equal rights; but when, by a "social contract," a state is organized, then its laws are to be observed. "The state is a creature of the human will, a moral person, whose object is pax et securitas communis."[2]

Of Spinoza.

§ 49. Spinoza took the lead in a new scheme of jurisprudence if it can be called such. As, according to his view, everything is God and God is everything, there can be no wrong done, for there is no such thing as wrong, successful might being right. Every person has *summum jus ad omnia quæ potest.* It is true that if each man follows without restraint his passions, universal disorder will result; and

[1] *Supra*, § 6; *infra*, §§ 56, 90 *et seq.*; see for Burke's criticisms on Hobbes, Tracts on Popery Laws, cap. iii. part 1.

[2] Geyer, *op. cit.* Judge Wilson, in his Lectures (i. 69), is in error in assuming Pufendorff to agree in this respect with Hobbes.

hence it is expedient to organize a community in which subordination to law will be maintained and the binding force of contracts recognized. But the sanctity of contracts is placed solely on the ground of expediency; they bind since "unus quisque naturae jure dolo agereapotest nec pactis stare tenetur, nisi spe majoris boni vel metu majoris mali." All distinction between right and wrong is thus swept away; law takes its origin in mere social policy, and is obeyed not from duty but solely from expediency. On this point, at least, we must concur with Leibnitz, as quoted by Geyer, in holding the position taken by Spinoza to be a "*doctrina pessimae notae.*"

Of Locke.

§ 50. Locke, to whose authority in this respect bowed not only the English whigs but several of the statesmen who took part in framing the revolutionary documents of the United States, revived, in his Treatises on Government, published in 1680, the theory of social contract, and defended it with singular lucidity and tact. In a state of nature, he argues, property only exists so far as needed for the use of men and by means of labor which can stamp on it the marks of ownership. In order to protect property thus acquired from aggressions, as well as to guard the person, a contract is made to establish a government and impose laws. Sovereignty is in the people, who, indeed, may convey it to a prince, but may withdraw it if it be abused. And whatever laws are adopted may be repealed.

Of Montesquieu.

§ 51. Montesquieu's Esprit des Lois, published, in its revised form, in 1757, was also largely appealed to by those concerned in the debates which preceded the formation of the constitution of the United States. Freedom he insists, rather, however, as a philosophical than as a political truth, is, so far as it involves a protection from unjust aggression, an inherent right which legislation cannot destroy. Law, to be rightly binding, must be the product of reason. But reason does not point to an absolute democracy. It indicates as the wisest form of government a system like that of England in which there are three estates—king, lords, and commons. The law is thus to be determined *à priori*, according to the dictates of reason. It is not the

product of fear, as Hobbes taught, or of contract, as Locke taught, or of conscience and social necessity, as is the tenet of the riper philosophies of more recent days, but it is the product of speculative thought, and for this reason is as likely to be as capricious as if it were the product of arbitrary will. It is remarkable that by so keen an observer as Montesquieu the influence of national conscience and of national traditions should have been overlooked in marshalling the factors in the formation of law. "He greatly underrates the stability of human nature. He pays little or no regard to the inherited qualities of the race, those qualities which each generation receives from its predecessors, and transmits, but slightly altered, to the generation which follows it."[1] He seizes, on the other hand, on certain peculiarities in the climate and physical conditions of a country, and uses these as the basis from which is *à priori* to be constructed the law of such country.

Of Blackstone.

§ 52. Blackstone[2] curiously mingles the historical theory and the contract theory with that of Hobbes. "The only true and natural foundations of society," he says in one place, "are the wants and fears of individuals." He proceeds to say: "Single families . . . formed the first natural society among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society."[3] He then slides into the contract theory. "Though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears, yet it is the *sense* of their weakness and imperfection that *keeps* mankind together, that demonstrates the necessity of this union, and that, therefore, is the solid and natural foundation, as well as the cement of civil society. *And this is what we mean by the original contract of society.*" . . . There is an evident intention here, while nominally accepting the contract theory, to fall back on that of fear and need. It should be observed, however, that fear and need are referred

[1] Sir H. Maine's Ancient Law, 112.

[2] Com., i. Introd., Cooley's ed., i. 46.

[3] Blackstone's Commentaries are more fully discussed in succeeding sections. *Inf.*, §§ 88 *et seq.*

to as the instigators of the organization of states, and not as permanent agents operating continuously in the modification of political constitutions. In fact, so perfect did the British constitution, as he conceived it, appear to Blackstone, that he took the extraordinary position that by any essential modification of its compromises it would be destroyed, and anarchy would result. "The constitutional government of this island," he maintained,[1] "is so admirably tempered and compounded, that nothing can endanger or hurt it but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of these three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end to our constitution. The legislature would be changed from that which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society, and such a change, however effected, is, according to Mr. Locke (who perhaps carries his theory too far), at once an entire dissolution of the bonds of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power." That Locke did not take the extreme position that the parties to a political contract, or their representatives and successors, cannot subsequently amend it, could be readily shown; but, be this as it may, Blackstone's admiration for the then British constitution was so unbounded as to make him foresee ruin in any derangement of its equipoises. Since Blackstone wrote, these equipoises, as stated by him, have been destroyed. The house of commons is no longer an oligarchy representing constituencies many of which were absolutely owned by great land-owners, most of them peers, but is now in a fair degree representative of the British people. The house of lords is so far "subservient" that it does not pretend to resist for any length of time a measure the house of commons persists in pressing. The sovereign has ceased to exercise the function of veto, and has

[1] Com., i. 46. See *inf.* § 80.

transferred all executive authority and patronage to a ministry whose members are virtually the nominees of the house of commons. If the views put forth by Blackstone in the extract given above are correct, alterations so vital as these would have dissolved the "social contract" on which the British constitution was based, and would have precipitated anarchy from which the only escape would be a new "social contract." So irrational is this conclusion that it would almost seem that it is introduced ironically by Blackstone for the purpose of exploding the "social contract" theory, and of thus indirectly vindicating that of conservative legitimacy. But whatever may have been his object, he gives his ostensible support to the assumption that the political systems existing in his time owed their origin to a contract between governors and governed, in making which want and fear were among the leading instigators.—The views of Blackstone on the important question of the basis of colonial law, and hence of the ultimate basis of the law in the United States, are given in a future section.[1]

Of Burke.

§ 53. Burke in his letters on a Regicide Peace, no doubt made a great error in urging the interference of England in the domestic affairs of France. In following out his policy England incurred an enormous debt, and lavished a vast amount of valuable blood for no practical purpose. Although Napoleon was ultimately overthrown mainly by England's influence, yet no influence could keep on the throne of France the Bourbons, whom England spent so much to restore. But this was not all. The attempt to force on France a system she had outgrown was hostile to the great principle which lay at the root of Burke's political philosophy. That principle, which Burke was the first to vindicate at large, and which gives the true basis of jurisprudence, cannot be so well expressed as in Burke's own words: "It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society, than the position that any body of men have a right to make what laws they please, or that laws can derive any authority from their institution merely, and independent of the quality of the

[1] *Inf.* § 64.

subject matter. All human laws are, properly speaking, only declaratory."[1] The same principle he thus reiterates after a long interval of time in his "Reflections on the Proceedings of the National Assembly:" "These exceptions and modifications," he says, speaking of the qualifications essential to all practical legislation, and eminently to that involving political considerations, "are made, not by the process of logic, but by the rules of prudence. *Prudence is not only first in the rank of the virtues, political and moral, but she is the director, the regulator, the standard of them all.* As no moral questions are ever abstract questions, this, before I judge upon any abstract proposition, must be embodied in circumstances; *for since things are right and wrong, morally speaking, only by their relation and connection with other things, this very question of what it is politically right to grant, depends upon its relation to its effects.*" "Circumstances," he adds, "give in reality to every political principle its distinguishing color and distinguishing effect. The *circumstances* are what render every civil and political scheme beneficial or obnoxious to mankind." And so of another striking passage in which Burke says: "Prejudice (that is to say, traditionary influence) renders a man's virtue his habit, not a series of unconnected acts. Through just prejudice, his duty becomes a part of his nature." "Is not this to say," so justly speaks Mr. Morley in his essay on Burke, "in other words, that in every man the substantial foundations of action consist of the accumulated layers which various generations of ancestors have placed for them?" Or, as Burke puts it, laws to work well must be in response to national conscience, and must satisfy national needs, as moulded by natural traditions. Mere speculative excellence will not make them good in practice.[2] A nation can be divorced neither from its past nor its future. Its geographical position, its climate, its religion, its products, and above all, its popular conscience and aptitudes, are to be taken into account. A law very well suited to Russia, for instance, might be very ill suited to the United States. A law which one nation has been gradually educated to receive, might be

[1] Tracts on the Popery Laws, cap. iii. part i. See more fully, *supra*, § 27. As to Burke's influence in this country, see *infra*, § 365.

[2] *Supra*, § 21.

impracticable for another nation. The laws which Locke devised for the government of colonial Carolina, admirably fitted as they might have been for a populous state with a homogeneous highly civilized population, utterly failed when applied to a sparsely settled colony, peopled by three distinct races.[1] The *à priori* constitutions proposed by French politicians in the national convention equally failed. A system of laws, to be permanently effective, must grow from the people. No laws, as it is well said, can be better than the people they are to govern. And Burke's main objection to the French Revolution was that it was a movement dictated not by the people to politicians, as was the case with the American Revolution, but by politicians to the people. There is no retreat even in the last of his writings from the rule laid down by him in the beginning of his career. "I am not one of those who think that the people are never wrong. They have been so, frequently and outrageously, both in other countries and in this. But I do say, that in all disputes between them and their rulers, the presumption is at least upon a par in favor of the people."

Of Kant.

§ 54. Kant probably never came across the works of Burke, but, as the basis of his system, he hits upon the same truths, however much he varies in their application. Equally with Burke he repudiates the theory that speculative happiness is the object of legislation, arguing that this standard is fallacious, as there is no agreement as to what happiness really is. Equally with Burke he rejects the idea of *à priori* philosophical legislation. Indeed, Kant's great service is that he shows the independence of practical and speculative reason, separating ethics and jurisprudence from metaphysics. Entrance into society, indeed, is an *à priori* necessity; but society, when once organized, generates consciously or unconsciously such laws as are suited to its conditions, and obedience to them, as well as performance of contracts, constitute a categorical imperative non-compliance with which can only be excused by necessity. Several passages in the works of this great author, it is true, introduce distinc-

[1] *Supra*, §§ 21-24.

tions which it is difficult to reconcile with the rules we have just stated. But be this as it may, Kant, as far as concerns the question immediately before us, takes the same ground as Burke.

§ 55. Savigny, also, while following in the same line, does not notice, and no doubt was unacquainted with Burke's discussion of the topic before us; and the similarity of Savigny's views with those of Burke may be explained on the ground of the naturalness of such conclusions in practical, and at the same time highly cultivated and liberal minds, shocked at the wild speculative legislation of the theorists of the French Revolution. But to Savigny has been paid, at least on the continent of Europe, an honor which has been denied Burke; for while Burke's expositions—the most eloquent political treatises, taking them as a whole, published in modern times—have attracted but little notice out of England, Savigny is venerated as the founder of what is called the historical school of jurisprudence,[1]—historical, because one of its chief features is its insistance on the position that no nation can be fitted out with a system of laws chosen for their speculative excellence, but that its particular past, as well as its particular present, and its distinctive conscience and genius, will of themselves produce such laws as will best meet its wants. The law of a people, he argues, like its language, its popular customs, its arts, has no independent existence, but is a manifestation of popular need and of popular sense of fitness. The test, indeed, is not what the people need, or are capable of at any one particular moment. We cannot sever any moment of time from the past or from the future. A nation has certain needs and capacities now, because it has been educated to them by a series of generations; and we must take this education in view in estimating the wisdom of any laws the nation may require. Neither can a nation be severed from its future. The wisdom of its laws is to be estimated in view of their adaptation to the future as well as to the present. Originally, so Savigny argues, law existed in the popular conception, not as a compendium of rules, but as a practice of right, exhibiting

Of Savigny.

[1] See this school noticed, *supra*, § 6.

itself in symbolical acts. But, as in individuals, the cultivation of language and of art moves with unequal steps, and requires suitable schooling, so with law,—its development depends on the past as well as the present characteristics of the people, and requires, in order that this development should progress, study on the part of jurists as a profession. The impulse to legislation comes from the nation as a body; it is by legal thinkers as a class that this impulse is technically shaped. But to the nation, as an organic continuous whole, are its laws to be traced. What the nation, in the long run, has willed, its laws will be. The nation must change the laws; the laws cannot change the nation unless it wills to be changed.

Of Bentham and Austin

§ 56. We now recur to a distinctively English school, the earliest impulse to which was given by Hobbes,[1] who, after a long period, was followed by two eminent thinkers, almost of our own day, Bentham and Austin. Of Bentham and Austin, as the modern exponents of what is called the analytical school, we will have occasion to speak more fully hereafter.[2] At present it is sufficient to say that they unite with Hobbes in ascribing the origin and authority of law to the secular sovereign. It is by the sovereign, whoever he may be, and not by national tradition, or national conscience, or national impulse, unless adopted and enforced by the sovereign, that laws are made. The defects arising from this limitation will be hereafter considered.[3] In this section it may be sufficient to give Austin's definition of sovereignty, and point to some of its faults and its advantages. "If," he declares, "a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society, including the superior, is a society political and independent." This, with the context, is thus paraphrased by Sir H. Maine:[4] "There is, in every independent political community—that is, in every political community not in the habit of obedience to a superior above itself—some single person or some combination of

[1] *Supra*, § 47.
[2] *Infra*, §§ 90 *et seq.*; *supra*, §§ 2–6.
[3] *Infra*, §§ 91 *et seq.*
[4] Early Hist. of Inst., Lect. XII.

persons, which has the power of compelling the other members of the community to do exactly as it pleases. This single person or group—this individual or this collegiate sovereign (to employ Austin's phrase) may be found in every independent political community, as certainly as the centre of gravity in a mass of matter. If the community be violently or voluntarily divided into a number of separate fragments, then, as soon as such fragments have settled down (perhaps after an interval of anarchy) into a state of equilibrium, the sovereign will exist, and with proper care will be discoverable in each of the now independent portions." The defect of this definition is that it is inapplicable to a federal system, like the United States, in which certain special functions of sovereignty are given to the Federal government, while the residuum of sovereignty is in the states. This, however, could be remedied by making Mr. Austin's definition run as follows: "A determinate human superior, *etc.*, who receives, *in certain relations*, habitual obedience from the bulk of a given society, is sovereign *in such relations* of such society," etc. The addition of the words italicized enables the definition to cover cases in which sovereignty is divided; and hence to provide for systems, likely to become more and more common, in which, under sovereigns limited to the exercise of specific functions, are grouped a series of local governments, each supreme in its allotted sphere. Other serious objections to this criterion have been already incidentally noticed, and will hereafter be more fully discussed.[1] It may be enough to say at this point that, as a matter of fact, it is not a universal requisite of law, as is maintained by Austin, that it should be imposed by a sovereign and enforced by a sovereign; and that, so far from such being the case, law, to be permanently effective, must emanate, consciously or unconsciously, from the nation, and correspond to national conscience and needs.[2]

[1] *Supra*, §§ 2, 23; *infra*, §§ 92 *et seq.*

[2] See, as to the inapplicability of these tests to the United States, *supra*, §§ 23 *et seq.*

Hobbes and Bentham were reconstructionists, appealing to sovereign force as the agency by which reconstruction was to be effected. They differed, however, in their objects; Hobbes making the object of reconstruction to be the good of the community under the direction of an auto-

§ 57. Judge James Wilson, one of the framers of the Federal constitution, and a judge of the Supreme Court of the United States, gave, in 1804, a course of lectures on law, in which he discussed with much fulness the topic before us. He controverts, as we have seen, the positions of Blackstone and Hobbes, and then proceeds: "Now that the will of a superior is discarded as an improper principle of obligation in human laws, it is natural to ask, What principle shall be introduced in its place? In its place I introduce the consent of those whose obedience the law requires. This I conceive to be the true origin of the obligation

James Wilson.

crat gifted with wisdom as well as with absolute force; Bentham making this object to be the greatest good of the greatest number, as determined by the sober and mature thought of the people as a body. They differed, also, in the character of their minds. Both were practical, but while Bentham issued propositions which might be called edicts on almost every point of legislation, Hobbes contented himself with propounding principles which, shrewdly as they were stated, could only be effectively used by the aid of disciples of intelligence equal to his own. Austin, on the other hand, was not, as will be seen more fully hereafter, a legislator, as was Bentham, nor is he entitled to the credit due to Hobbes of calling public attention to the responsibility of force. He has, however, the great merit of giving to the public expositions which, obscure as they are in many parts, are still the fullest and the best which the English language has as yet produced of the utilitarian aspects of jurisprudence. Of the defects of his system we will soon more fully speak. *Infra*, §§ 92 *et seq.*

To Sir Henry Maine's objection that customary law is not imposed by a sovereign nor enforced by a sovereign, the answer made is, that the people who impose the law are the sovereign's representatives, and that if required, the sovereign will enforce the law as a final resort. "The local force," so it is put by Professor Holland, "must, if only for the preservation of the peace, be supported, in the last resort, by the whole strength of the empire." (See a thoughtful review of Mr. Lightwood's book in the London Spectator of October 6, 1883.) But however effective this answer may be in the case of the Indian village communities, as put by Sir Henry Maine, it does not hold good in respect to the early laws of our American colonies. These laws did not emanate from the sovereign, and it was known in many cases that they were in direct antagonism to the sovereign's views. Many of them were not only not enforceable by the sovereign, but it was known that the sovereign would spurn them when they were brought to his notice. Yet, as we have more fully seen, they were, nevertheless, laws; and some of them, *i. e.*, those which were in unison with the continuous conscience and needs of the colonies, were afterwards solemnly declared to have been laws from the settlement by the colonies when they became states. See *supra*, §§ 23 *et seq.*; and, as to North American Indians, *supra*, § 26.

of human laws." "Custom is of itself intrinsical evidence of consent. How was a custom introduced? By voluntary adoption. How did it become general? By the instances of voluntary adoption being introduced. How did it become lasting? By voluntary and satisfactory experience, which ratified and confirmed what voluntary adoption had introduced. In the introduction, in the extension, in the continuance of customary law, we find the operations of consent universally predominant."[1]

§ 58. The system of Mr. Herbert Spencer will be hereafter more fully noticed.[2] It is sufficient at this point to say that, according to Mr. Spencer, the law of a nation is the product of custom flowing from and through prior generations, its quality and its course modified by their distinctive characteristics; and, among these characteristics, conscience is one of the most effective. Conscience may be the product of hereditary tendency, acquiring new force and delicacy in each successive age of cultivation. But it is for this reason none the less effective as one of the agents by which law is generated. Nor does this evolution exclude the idea of divine authorship and guidance.

Herbert Spencer.

§ 59. There is unquestionably much in Savigny's exposition that may be criticized. We may be unable fully to agree with him in treating a nation as a continuous perpetual person; the transmutations and absorptions of nations that history records admonish us that old nations may be extinguished and new nations called into life. We may also think that the existence of a "Volksgeist" has been too arbitrarily assumed, so far as it implies the ascription to nations of constant and distinct tendencies such as those which separate individuals from individuals. But however this may be, we cannot, if we view law historically, look upon it otherwise than as the product of national conscience and need. What conscience, in the sense in which the term is here used, means will be considered in the next section. It is sufficient here to say that, judging from what we know of the past, a law which is

Law is the product of national conscience and need.

[1] Wilson's Lectures, i. 99.

[2] *Infra*, § 106.

in antagonism with the conscience of the nation on which it is imposed cannot permanently stand; a law which national conscience calls for will sooner or later be established.[1] But with this is to be considered the factor of national need. In matters in which conscience is not imperative, need, or, in other words, policy, determines. Hence we here fall into the line of Burke and Savigny in maintaining that legislation, to be judicious and effective, must come from the people and conform itself to their sense of right and to their national needs, as moulded by their past training, as well as their present environments. It may be that the historical school has led, as it certainly did in Burke's case, to an undue reverence for those institutions which a nation has outgrown. But this is not a necessary incident of the theory on which that school rests. On the contrary, the recognition of the continuousness of the existence of a nation, composed, as is necessarily the case, of elements constantly changing and developing, involves the corresponding and sympathetic change and development of the laws which emanate from such nation. Even the sense of right itself becomes more comprehensive, though not less imperative, with the progress of national culture. Slavery, for instance, which was approved by many of the most eminent divines and defended by many of the most eminent moralists a century and a half ago, is now universally reprobated.[2]

Conscience is not an insulated moral sense, but

§ 60. Conscience, in the sense in which the term is here used, is not to be confounded with what is called the moral sense, so far as this is supposed to be an independent agent. That this supposition is erroneous is elsewhere abundantly illustrated,[3] it being shown

[1] *Supra*, § 27.

[2] See on this point, as to the views of Herbert Spencer, *infra*, §§ 60, 106.

In the sense of the text is to be understood Lord Mansfield's famous tribute to Socrates: "I will take the liberty to call him the great lawyer of antiquity, since the first principles of all law are derived from his philosophy."—Lord Campbell's Lives of the Chief Justices, ii. p. 591. The "first principles of all law," as found in Socrates, are that law should be based on the right, and that expediency or "utility" is to be pursued only as a means of making the right more effective. See *supra*, § 43.

[3] Whart. and St. Med. Juris., i. §§ 531–7, Whart. Crim. Law, 8th ed. § 46.

is a combination of sense of right with reason and hereditary and traditional tendencies.

that the moral sense, as it is called, is not a distinct faculty capable of becoming insane by itself, the rest of the system being sane, but that it is only one of several ingredients of a common nature. It makes no difference, in this relation, whether the moral sense is the result of long processes of individual and race culture, or of direct divine implantation and guidance.[1] That reason and revelation are co-ordinate, and that laws on mutable matters are mutable, are the two great propositions established by Hooker in his masterly treatise;[2] and even assuming certain convictions as to right to be of divine authorship, they are co-ordinated with reason as follows: (1) By reason their authority is to be tested. It would be a *petitio principii* to say that they supersede reason because they are divine when whether they are divine must first be determined by reason. (2) They must be interpreted by reason. There is no revelation which may not be ambiguous either from the terms in which it is couched or from the objects to which it relates. (3) So far as concerns their application to things mutable, they are to be modified by reason, and as materials on which reason is to act are to be enumerated national aptitudes and tastes, national resources, national traditions. In the incorporation of these factors in the materials on which reason is to act, and this assignment to reason of a co-ordinate rank with the sense of right, a common ground is found on which the ethical and historical schools unite.[3]

[1] See, as showing the power of race culture, Herbert Spencer's Principles of Morality, Appleton's ed., 1883, and also *infra*, § 106. In the Nineteenth Century for June, 1883, will be found an article by Miss Cobbe, contesting the heredity of conscience, to which there is a reply in the November number of the same paper by Mr. Picton. That Mr. Picton is in error in ascribing conscience to custom is shown by the fact that by conscience is custom often resisted to the death.

[2] *Infra*, § 86.

[3] See *supra*, § 6. That conscience, in this sense, is recognized by common law rulings, see *infra*, § 96. That utility is not a substitute, see *infra*, § 97. As to Hooker, see *infra*, § 86; *supra*, § 33.

The following passage from Trendelenburg, the greatest of German logicians (Naturrecht, pp. 56 *et seq.*), is given from Prof. Lorimer's translation (Institutes, 2d ed., 195):—

"The appetites and desires, confined and limited, are separate and particular sides of human nature, of the

§ 61. We have already seen[1] that custom is the first step in the formation of law. But the process is not one of blind

human being regarded as a whole; and an evil conscience consists in the reflex action of the whole man against a part which has attempted to assert an undivided supremacy—an action which exhibits itself in the form of remonstrances, accompanied with certain painful and pleasurable emotions. The phenomenon of a good conscience is still more readily intelligible. It is the assent of the whole man to the action of a part which has remained in harmony with his general nature. What is called a warning conscience still rests on the same ground. It consists in remonstrances, which, arising out of the whole man, forbid the promptings of the self-asserting part before they have vindicated their supremacy. . . . Language has striking pictures by which to characterize those acts of self-judgment which terminate in profound emotions. She speaks of the conscience being stunned and benumbed, thereby indicating that condition in which either the old desires and passions, or some new-born desire or passion, has so absorbed the whole man as to prevent any association of ideas from an opposite point, any thought which prevents the whole man from coming to light, or from gaining the ascendency. A sleeping conscience, again, is opposed to a waking conscience, the former exhibiting very nearly the phenomena just described, whereas the latter indicates the condition in which, after peace has been established, either the whole man, or another side of the man from that which dominated him before, comes into action and vindicates the ascendency of his better impulses."

The development of conscience referred to in the text is thus discussed: "When the rise of conscience is correctly stated in its natural connection and mental origin, it becomes evident that it is no ready-made organ, with a definite and positive purport, but that it develops itself in the midst of the relations of life and the experiences of the individual. Though the idea of the whole man—the idea of humanity in the individual—which constitutes the last determining ground of conscience is the same always and in all, it depends upon a number of subjective circumstances, which are ever changing in the inner life of the individual, to what extent the whole man is active through means of conscience. By directing our attention to the manner in which conscience is developed, we become acquainted with the means by which it may be awakened and sharpened, rectified, deepened, called into action, and guarded, in order that it may become a clear and pure divine voice."

"Conscience," says Prof. Lorimer, very truly (Institutes, 2d ed., 186), "is not a separate faculty, but the phase in which our whole normal nature appears when manifesting itself ethically. It is important to remark that the sense attached to the word conscience, when it did come into technical use, whether by the later representatives of the Socratic school of ethics or by the Orthodox Christian Church, was not that of a separate faculty, still less of a sense, resembling, in any degree, however remote, our physical senses. Conscience, as they understood it, was not a part of our nature sitting in judgment on the rest

[1] *Supra*, § 14.

development, proceeding without either volition or sense of duty on the part of those by whom the custom is formed. It is true that the process may be in one sense, as has been seen, and as will presently be more fully noticed, instinctive and unconscious. Those concerned in it may not be aware that in setting a precedent, or in following a precedent, they may be making a permanent law.[1]

Custom the intermediate factor.

of our nature, but the phase in which our whole, and as such our normal nature appears when manifesting itself ethically."

It is not necessary to the existence of a moral sense that knowledge of it should be communicated by revelation, or should be planted as an innate principle in the breast. Thus Kant, in answer to the question, "How do we arrive at the consciousness of the moral law?" replies: "The answer is the same as in the case of any other proposition *à priori*, that we are conscious of a practical law *à priori*, as we are conscious of theoretical ones, by attending to the necessity with which reason obtrudes them in the mind." "Our consciousness of this fundamental law is an ultimate fact of reason, for it issues from no preceding data, *e.g.*, the consciousness of freedom, but is thrust on the mind directly, as a synthetic *à priori* proposition, and is bottomed on no intuition whatever, whether *à priori* or *à posteriori*. . . . It is the single isolated fact of practical reason, announcing itself as legislative—*sic volo, sic jubeo*." Metaphy. of Ethics, Semple's Trans. 101–102. Now, as is argued by Prof. Lorimer, after citing these passages, Kant may go too far in including a whole moral system in this "categorical imperative;" but, that there is a "categorical imperative" which commands us to follow the right and avoid the wrong, it is the main object of his system to show. When such an authority is established, then to follow the argument in the text, it is to be interpreted by reason and applied by reason.

That human nature is indivisible—that the moral sense, therefore, cannot be detached from that nature so as to be separately sane or insane, or so as to be in conflict with that nature as a whole, is the drift of the argument of the second and third of those celebrated sermons which Bishop Butler has devoted to this topic. One or more of the passions to which this nature is subject may assail it, and receive aid from within; yet the assault is against the nature as a whole, conscience being the arbiter.

This is shown forcibly by Whewell, in his edition of Butler's Sermons on Human Nature. Butler, he justly says, is far from accepting the doctrine of the existence of a "moral sense" as a distinct faculty. "It may be doubted," says Whewell, "whether such a crude and physical notion of a moral sense was ever entertained by any thoughtful moralist; for the judgment of man concerning actions as good or bad, cannot be expressed or formed without reference in language to social relations and acknowleged rights; and the apprehension of this implies the agency of this understanding in a manner quite different from the perceptions of the bodily senses. It is plain, at least, as I have already said, that Butler never dreamt of asserting a moral sense in any such use of the term as this."

[1] See *infra*, § 94.

They may nevertheless, in making the precedent, or in following the precedent, be acting in obedience to a sense of right, and in response to a sense of need. He who first strikes out a path across a country partly inclosed, to recur to an analogy already stated, has two distinct motives pressing upon him.[1] The first may be called conscience; he has his duty to perform, he must perform this in such a manner as not to trespass on his neighbor's inclosed field which lies in his way. It might be much shorter for him to cut across that field, a corner of which runs out on the open waste closing up the direct line in which he might otherwise move. But his sense of right precludes him from climbing his neighbor's fence and trampling on his neighbor's sod. He therefore skirts round the inclosure, making what is the best path he can to the point he has in view. With the sense of duty and right, however, comes in the sense of need. He has an object he is obliged to effect; some necessary of life, it may be, to obtain. He therefore hurries on his way, yet not in an absolutely straight line. "One may walk in a straight line across a waste," said Dr. Johnson, "but not in a straight line through Cheapside." But though it is possible to walk in a straight line across a waste—though the traveller is not forced to swerve to and fro by the tide of human beings he meets—yet even across a waste we rarely find a path that is straight. A thick clump of underbrush is in the way, and the first traveller, instead of forcing himself through it, passes around it; and his steps turn to the right or to the left as he goes on to avoid a stone or a hole. The next persons following him pursue the same line, it may be because the print of his feet establish a sort of precedent, it may be because this is at once the most convenient way, the sense of right and the sense of need, in this minor scale, making it so. After a while the path is formed. It is impossible to say who first trod it; it is certain that those who first trod it did so without the intention of forming a settled way. After a while the obstacles that caused the swaying of the path to and fro are removed and forgotten; the brush

[1] See Holland's Juris., 2d ed., 45.

is cut down, the stone carried away, the hole filled up, and no memory of them is retained. The crooked path, however, remains; and sometimes it may become a thoroughfare in a great city. It was produced by custom started by a sense of right and sense of need; the sense of right being the sense of the object to be performed and of the duty of refraining when performing it from invading the rights of others; the sense of need being the sense of the importance of the object, and of the convenience of avoiding any obstacles which may be in the way of being reached. So it is with law. The chief agency in its production is custom. But the custom finds its origin in a sense of right and a sense of need. These influences act at first only on one or two persons. Others, however, follow in the same line, either because the impulse and object are the same, or because the path is laid. Gradually there is a general acceptance of the precedent as a rule of action, and thus the precedent becomes a custom, and the custom becomes a law.

§ 62. It does not follow, therefore, that the law-making functions of conscience which have been noticed above are always exercised consciously. Such is no doubt sometimes the case. Conscience may by long efforts and by a reiteration of earnest appeal overcome the resistance not only of the governing classes, but of the body of the nation itself, as was the case in England with the statutes abolishing slavery in the British West Indies.[1] But in most cases the operation of the sense of right is instinctive and unconscious. There are rare conjunctions when statesmen of great prescience and sagacity may see that a particular law is essential to the prosperity of the people, and may force the enactment of such law. But the common law as a whole, while it moves, moves so slowly and unobservedly, that though it occupies in each generation a position different from that it occupied in a prior generation, at no particular time can it be spoken of as in motion. It is in this respect like a glacier which is congealed and yet flows. It is complex and tenacious; it forms a solid and consistent structure; it incor-

Primary law making instinctive and unconscious.

[1] See *supra*, § 20.

porates in its volume whatever rights belong to the community, either corporately or individually; yet still it moves on, and not only moves but expands. But there is one leading feature in respect to which all material analogies fail. While the law moves thus unobservedly—while new rules come into existence no one knows how, and no one knows when—it moves in complex sympathy with the conscience and genius of the people from whom it emanates. Spontaneously and instinctively there appears a redress for every wrong, and a retribution for every injury.[1] So arises the common law, which, from its very nature, fluctuates instinctively with the people whose sense of right it expresses, and whose needs it meets. And no code that is not in like manner declaratory of the popular sense of right and need can stand. The code Napoleon has often been spoken of as if it were the creation of the great chieftain whose name it bears. But the permanency of the code Napoleon is attributable, (1) to its adaptation to the settled habits and needs of the French people, (2) to the comprehensive elasticity of its terms. It is because it is the expression of the national will, and because its terms are broad enough to give play to national changes, that it continues to exist.[2]

Authority calls for law, but law limits authority.

§ 63. The question of the basis of law, which we have heretofore discussed, necessarily involves the much contested question of precedence between law and authority. It is insisted by Hooker,[3] by Locke, and by Burke, that law is more or less the product of

[1] See Whar. Crim. Law, 8th ed., §§ 15 *et seq.*

[2] *Infra*, § 114.

"It (the common law) was the outgrowth of the habits of thought and action of the people, and was modified gradually and insensibly from time to time as those habits became modified, and as civilization advanced, and new inventions introduced new wants and conveniences, and new modes of business." Cooley's Const. Lim., 4th ed., 28.

[3] "To supply those defects and imperfections which are in us, living singly and solely by ourselves, we are naturally induced to seek communion and fellowship with others. *This was the cause of men's uniting themselves at first in politic societies*, which societies could not be without government, nor government without a distinct kind of law from that which hath been already declared." Hooker, Eccl. Pol., Book i. ch. x. § 1. "The assent of them who are to be governed seemeth necessary." Ibid. § 4. "They" (those

consent; and in the hands of Rousseau this view took the shape of a social contract, from which all government emanates. On the other hand, it is maintained by Hobbes that law cannot exist without a law maker, who is necessarily the sovereign; and this view is accepted by Bentham and by Austin. Both of these views are in part true. There is, on the one side, no system of law which is not traceable more or less to consent. This is so with England and France, as much as it is with the United States; and even Austria, when she traces her pedigree back of the reorganization consequent on the French Revolution, reverts to election as the basis on which rested the imperial sceptre. On the other hand, it is impossible not to see the force of the position of Bentham and Austin, that to assume a law necessarily assumes a prior lawgiver. To this, however, two replies may be offered: (1) A lawgiver is not necessarily a separate personal sovereign. Conscience is itself a lawgiver, and, as we have seen, is of all lawgivers the most potent and most widely recognized. (2) Even supposing that a law assumes a prior external personal authority, this authority, so we may gather from the history of past legislation, is not a sovereign permanently established, since to such establishment law is a prerequisite, but a mere provisional proposer of legislation. The English statesmen who invited William of Orange to invade England proposed a new system for England; but this system was not established until it received the assent of the convention parliament. Jefferson, in his letters, and Patrick Henry and John Adams, in their speeches, proposed the organization of an independent government in the United States, but this government owed its establishment to the action of the people legislating through their chosen representatives. When the house of representatives of the United States, in 1839, was in a state of apparently helpless confusion, owing to a failure to organize, Mr. John Quincy Adams, then a member of the house, as eminent for ability and integrity as for public services, took upon himself to intervene as a pri-

who framed existing governments) "saw that to live by one man's will, became the cause of all men's misery. This constrained them to come unto laws wherein all men might see their duties beforehand, and know the penalties of transgressing them." Ib. § 5, see *infra*, § 86.

vate member, and assume the temporary position of speaker. This was without law; nor did it make law; but it was the impulse to a reorganization by which law was made. Such, in fact, is the sequence we can suppose always to exist. A father, for instance, starts the law for the family, but the family afterwards mould the law. A new era in the life of the community approaches, and this era is heralded by a reformer who opens the way to legislation, which is the emanation not of his will, but of that of the community to which it is to apply. Hence it is, that, while authority starts law, law limits authority. A claimant to sovereignty may give the impulse to legislation, but it is legislation which determines sovereignty. In this sense we are to accept Bacon's position, already noticed,[1] that it is the law which makes the king. The law determines who the king is, and to what extent he is to be obeyed. "Towards the king himself, the law has a double office or operation: the first is to entitle the king or design him; and in that sense Bracton saith well (lib. ii. fol. 5, and lib. iii. fol. 107): *Lex facit quod ipse sit rex;* that is, it defines his title. . . . The second is, that whereof we need not speak in good and happy times such as these are, to make the ordinary power of the king more definite or regular. For it was well said by a father, *plenitudo potestatis est plenitudo tempestatis.* And, although the king in his person be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day."[2] In other words, law tests the title of sovereignty and determines its extent.

Common law in this country product not of conquest, nor of colonization, but of adoption.

§ 64. We have already noticed that there are two distinct theories set forth as to the basis of the common law in this country.[3] The first, the conquest theory, as it may be called, is that, as the colonization of this country was effected by conquest, the law of the conquered community remains in force until superseded by the conqueror. If this be true, then over such portions of this country as were conquered from the Indians, Indian law would remain in force until superseded

[1] *Supra*, § 2.

[2] Case of the Post-Nati, 15 Bacon's Works, Spedding's ed., 200.

[3] As to relations of the common law to American jurisprudence see *supra*, § 25.

by British law specifically imposed; and the same conclusion, *mutatis mutandis*, would be reached as to the Dutch law in the colonies conquered from the Dutch, the Spanish law in the colonies conquered from Spain, the French laws in the colonies ceded by France. That this is the case with the colonies conquered from the Indians is maintained by Blackstone[1] and other eminent commentators; but to this it may be replied, (1) as is said by Marshall, C. J., the Indians did not possess a distinct national existence, and (2) they did not possess a system of law which could be the basis of the law of any civilized people. There is a good deal, it is true, to sustain this theory in the history of Louisiana, where the Roman law remains as the basis of the local law, while so much of the English law as is in force has been imposed distinctively by statute. But the theory does not hold good with respect to California and Texas, in which the Spanish law—or Roman law, on which the Spanish rests—has left no traces except in its relation to land titles prior to the separation from Mexico. Similar questions arise in respect to New York and the settlements on the Delaware, which were conquered by the English from the Dutch, the Dutch, as to the Delaware settlements, having dispossessed the Swedes. If the conquest theory is correct, then the Dutch law is at the basis of the law of New York, and only so much of the English law is in force as has been expressly imposed by the English.[2]

[1] 1 Black Com., 107; 1 Steph. Com., 107.

[2] The distinction is thus put in Stephen's Com. (8th ed., 1880), i. 104: "In case of a colony acquired by occupancy, acts of parliament passed before its acquisition, come into force immediately upon that event, as part of the general law of England—as to all provisions at least, not unsuitable to its social circumstances. But a colony won by conquest or cession is not in general affected by statutes of the United Kingdom passed before its acquisition." It is also stated that "though it is competent to parliament to legislate for the colonies, yet a colony is not considered as affected by acts of parliament passed after its acquisition, and while it is subject to other legislative authority, . . . unless it be referred to in the act, or unless the act be, from its nature, obviously intended to affect all our possessions wherever situate." If this conception be true, the question how far English statutes were adopted by the English colonies in this country would be dependent on the question whether such colonies were conquests or discoveries.

That the English took New York as a conquest from the Dutch is maintained

The second theory is that of discovery, as it is called; it being held that the first discoverers of an uncivilized country bring to it their common law. That the English were the first discoverers of the Atlantic seaboard is maintained as a matter of fact; and from this flows the conclusion that, if this theory be correct, they planted on the Atlantic seaboard the English common law. But the difficulty as to this theory is that it rests on an assumption singularly arbitrary. If the first discoverer of the new world stamped on it the jurisprudence of his country, that jurisprudence was certainly not the common law of England. If the first settlers on the Mississippi Valley gave to that valley their jurisprudence, then to the Roman and not to the English common law must we look for our primordial system. Nor, even assuming that Englishmen were the first discoverers of our Atlantic seaboard, did England exercise over her North American colonies that care which the planting of a systematic jurisprudence assumes. The colonists of New England left England, not under government tutelage, as England's agents, but in sullen revolt against England, to escape, not to extend, English laws in the shape they then assumed.[1] The colonists of Pennsylvania were also most of them exiles for conscience' sake. It was otherwise, it is true, with the colonists of the more southern colonies; but these colonists cannot, any more than their northern neighbors, be regarded as England's representatives for the establishing in America of English jurisprudence. "When I know that the colonies," said Burke, in his speech on conciliation with America, "in general owe little or nothing to any care of ours, and that they are not squeezed into this happy form by the constraint of watchful and suspicious

by Judge Tucker (Tucker's Black., i. 382), by eminent colonial counsel consulted on this point (Smith's Hist. N. Y., p. 248), and by Lord Mansfield, Cowp. 211. See 21 Alb. L. J. 9. It has been held by the Court of Appeals that the Dutch were during their occupancy the political sovereigns of New York. Dunham *v.* Williams, 37 N. Y. 251. And see argument of counsel in Jackson *v.* Gilchrist, 15 Johns. 89. On the other hand, Chancellor Walworth expressly claims that the English title to New York is that of discoverers, bringing with them their own law. Canal Appraisers *v.* People, 17 Wend. 570.

[1] See Dr. Franklin's remarks, *supra*, § 22.

government, but that, through a wise and salutary neglect, a generous nation has been suffered to take her own way to perfection; when I reflect on these effects, when I see how profitable they have been to us, I feel all the pride of power sink, and all presumption in the wisdom of human contrivances melt and die away within me. My rigour relents—I pardon something to the spirit of liberty." It was the "spirit of liberty" which led not merely to the settlement of Englishmen in this country, but to their selection of a system of laws of their own. It is true that English statesmen and philosophers devised schemes of law for colonial government; but these schemes were never seriously pressed, and soon fell to the ground.[1] The laws the colonies made were neither dictated by England nor favored by England. The best of these laws were rejected by England and grew up in the teeth of England's veto.[2] The common law of each province, and the statute law of each province, was made by itself. It took what it wanted from English jurisprudence. It refused to accept what it did not want, no matter how strongly it might be pressed by crown or proprietor. And it added, in the teeth of royal or proprietary inhibition, whatever it was impelled to addby its conscience or its sense of need.

The third theory, and that which is most consistent with the views taken in the preceding pages, is that of popular adoption; it being assumed by this theory that the inhabitants of each province evolve a common law in harmony with their traditions and habits, and in submission to their conscience and sense of need.[3]

[1] *Supra*, § 21.

[2] *Supra*, §§ 22–6.

[3] See *supra*, § 25.

The growth of law in Pennsylvania has been distinctively discussed, *supra*, § 23. The early history of New York law is given in a series of excellent articles in the Albany Law Journal, vol. xx. pp. 326, 466; vol. xxi. pp. 7, 127, 267.

That the English colonists brought with them the leading principles of the common law as the basis of discovery, seems to be asserted in Bogardus *v.* Trinity Church, 4 Paige, 478. As sanctioning the text, see De Ruyter *v.* St. Peter's Ch., 3 Barb. Chanc. 119; Sharswood's Blackstone, i. 107, note. And see further, *supra*, §§ 16, 22.

To sustain the theory of adoption (the third theory stated in the text) may be cited Chancellor Kent's statement (Com. i. 473), that the common law of England "was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal

charters and colonial statutes." This leaves out of sight the Dutch colonists of New York, and ignores the conquest theory which would have left Dutch laws in force until expressly superseded by English legislation. The position of Chancellor Kent can only be sustained by assuming that the English colonists, when they took possession of New York, organized (either by custom operating gradually and spontaneously or by express legislation) a system of laws of their own. This is the conclusion adopted in the text. Chief Justice Sharswood, in his notes to Blackstone, as above cited, denies the accuracy of Blackstone's statement that the American plantations were conquered; and in his lecture before the Law Academy, of September 21, 1855, argues that the "claim of England to the soil was made by her by virtue of discovery, not conquest or session. The aborigines were considered but as mere occupants; not sovereign proprietors." But it is hard to see how this can be applied to those portions of the seaboard which the English conquered from the Dutch, having previously recognized the Dutch as sovereigns. And by no possible ingenuity can the English claims to title by discovery be made good in respect to Louisiana, Texas, and the territory on the Pacific conquered from Mexico. If this be so we are reduced to the alternatives of the conquest theory or the theory of adoption. And of the two the latter theory only fits the fact that the English common law is at the basis of the jurisprudence of New York as of Massachusetts and Virginia.

"The law of charities is fully adopted in Georgia *as far as is compatible with a free government where no royal prerogative is exercised.*" Bradley, J., aff. in Jones *v.* Habersham, 107 U. S. 180.

CHAPTER III.

HISTORY OF ENGLISH AND AMERICAN LAW.

French law the foundation of Norman law, § 66.
Anglo-Saxon law of distinctive origin, § 67.
Anglo-Norman law a product of both, § 68.
Statutes distinguished from common law, § 69.
Practice as to writs, § 70.
Peculiar value of ancient English records, § 71.
Authority of reports, § 72.
law treatises, § 73.
Dialogues de Scaccario, § 74.
Glanville, § 75.
Bracton, § 76.
Fleta, § 77.
Gilbert of Thorton, § 78.
Britton, § 79.
Hengham, § 80.
Progress from the 14th century, § 81.
Early reports, § 82.
Treatises: Fortescue, De Laudibus, etc., § 83.
Littleton, § 84.
St. Jerman, Stamford, § 85.
Hooker, Bacon, § 86.
Coke, § 87.
Blackstone, § 88.
Objections based on his optimism and finality, § 89.
Bentham as the champion of reform, § 90.
Austin as a leader of juridical thought, § 91.
Effectiveness of his analysis, § 92.
His theory of origin of law unsatisfactory, § 93.
And so of his view of development of law, § 94.
System defective in leaving out of sight moral sense, § 95.
Rejection of moral sense not consistent with common law rulings, § 96.
Utility not a satisfactory substitute from its indefiniteness, § 97.
So from its arbitrariness, § 98.
So as ignoring national traditions, § 99.
So as to national genius, § 100.
Austin's conception of negligence defective, § 101.
merits as a reformer, § 102.
merits as vindicating "judiciary law," § 103.
Mystical and logical schools of utilitarians, § 104.
Distinctive views of Holland, § 105.
of Herbert Spencer, § 106.
Reforms recently adopted in England, § 107.
American jurists: Story, § 108.
Kent, § 109.
Wheaton, § 110.
In this country the colonies received the common law as far as adapted to their particular conditions, § 111.
Recent English reforms anticipated in the United States, § 112.
And so of "prevalence of equity," § 113.
Fixity of a code incompatible with destiny required by evolution, § 114.

§ 66. PRIOR to the conquest of England, in 1066, the law governing Normandy was that existing in common with France. It is true that by the treaty of Saint Clair, in 912, a part of Neustria, constituting substantially the future Normandy, was transferred by Charles the Simple to the Normans. But the old Frank institutions, so far from being cast aside by the new occupants, were endued with additional vigor. No judicial records of those days remain; and only general intimations from which we can gather that until the invasion of England the Normans retained the old Frank institutions. After the establishment of the Normans in England, and the introduction by them of Frank law, that law became the subject of much interest and of copious exposition. The *curia regis* (king's bench), a reproduction of the French royal court, became the starting point of the principal reforms. Under Henry II. the term Scaccarium (Echiquier) was used in the same relation and in England the echiquier was at once a court of justice and a tribunal of accounts. Under Henry I. the members of the scaccarium were divided into barons and justices; the justices being men trained to the law, and gradually absorbing the business litigation of the state, the king's bench taking personal litigation, and litigation affecting the peace of the realm. The scaccarium became in this way a school of capable officials, whose duty it was to establish an accurate system of business accounts for the Norman realm; the results being retained in the *Magni Rotuli Scaccarii*. Of this we have records of greater or less fulness for the years 1180, 1184, 1195, 1198, 1201, and 1203; and the details here given, open, in respect to income and receipts, an interesting view of the Norman juridical system of those days.[1] The Norman *curia*

Old French law the foundation of Norman law.

[1] The exchequer rolls were edited in 1840–44, by Stapleton, under the title: "Magni Rotuli Scaccarii Normanniæ sub regibus Angliæ," 2 vols., with "observations on the great rolls of the Exchequer." A review and summary of this work is given in the Mémoires de la Société des Antiquaires de Normandie, vols. 15 and 16; and in the 16th volume of the same work a fragment of the Rotulus for 1184 is published by Delisle, with valuable notes. Dr. Brunner, in his excellent essay on this topic, in Holtzendorff's Rechtslexicon, i. 298, refers to an unfinished essay by Delisle: "Des revenus publics en Normandie au XII ième siècle in der Bibliothèque de l'école des

ducis adopted with increased efficiency the jurisdiction of the French royal court. The popular tendency was to extend trial by duel. This was held in check by the *curia ducis*, which established a system of justice which was carried on under ducal writ. Under the *curia ducis*, trials by duel and by wager fell into disuse, and trial by *inquisitio* (or proof) was instituted; and under this *inquisitio* a jury was summoned and proof by witnesses and writings adduced, the jury being composed of persons from the vicinage supposed to be acquainted with the facts.—A statute of Henry II. (1150-2) established a specific form of *inquisitio*, called *recognitio*, as an ordinary method of proof, to be adduced before the *justiciarii itinerantes* holding assizes from place to place under writs from the ducal chancery.—No material change of the Norman system was effected by the conquest by Philip Augustus, who, on acquiring possession, expressly guaranteed to the land all its privileges. To Philip Augustus no peculiar development of Norman law is to be assigned.—The statuta et consuetudines Normanniae—Établissements et Coutumes de Normandie—contains two parts: the first of which consists of statutes of the last years of the twelfth century and of the earlier years of the thirteenth century; the second part, *Tractatus de brevibus et recognitionibus*, exhibits a more recent condition of things, giving the details of the Norman recognition practice, to which reference has been made.[1] The first original register or roll-book of the judicial acts of the Norman exchiquier now in existence goes back to 1336, although there is proof of the existence of an official register in the thirteenth century. As many as 834 judgments of the exchiquier in the thirteenth century are given by Delisle in his compilation published in Paris in 1864. But, according to Dr. Brunner, the most copious and comprehensive reproduction of Norman law is a work prepared not later than 1280, the Latin title

chartes, S. II. 5, S. III. 1, 3." The whole topic is discussed with great ability by Mr. Stubbs, in his Constitutional History of England, London, 1880.

[1] Brunner mentions that this compilation is to be found, in French, in Warnkönig's Französische Rechtsgeschicte, vol. ii.; and, in Latin, in Marnièr's Établissements et Coutumes, etc., Paris, 1839.

being "Somma de legibus consuetudinum Normannie," the French title "Grand Contumier de Normandie." The statutes and customs of Normandy are given by the unknown author of this work not only with fulness and accuracy, but with a system not unlike the English law books previously published, so that it may be ranked with them as an exposition of contemporary Anglo-Norman law. That the work met the practical wants of the times is illustrated by the fact that it was used for centuries as an authoritative exposition of Norman law. Its value as an exposition of Anglo-Norman law arises from the fact that it contains the laws and customs of Normandy at the time when some of those laws and customs were incorporated in the English system. Subsequent to the preparation of the *Somma*, the Norman law gradually approximated to the French, not so much in the abrogation of statutes as in the modification of customs, and in the construction given to these statutes by the French judges then presiding in the Norman courts.[1]

Anglo-Saxon law of distinctive origin.

§ 67. The classical Roman law was administered by the courts established by the Romans during the Roman dominancy of England. "It is a very remarkable fact," says Sir R. Phillimore,[2] "that, from the reign of Claudius to that of Honorius (a period of about three hundred and sixty years), her judgment-seats had been filled by some of the most eminent of those lawyers (Papinian, Paulus, and Ulpian), whose opinions were afterwards incorporated into the Justinian compilation." This, however, was only during the Roman occupancy. In the chaos that followed the Roman law, as such, ceased to be authoritative, though an acquaintance with it lingered among the clergy. The first system of law that emerges, in the awakening at the close of

[1] Further details as to the old Norman law will be found in Dr. Brunner's article, already noticed, in Holtzendorff's Ency. (1882), 300-1. Stapleton's work has already been noticed. See, also, Madox, History and Antiquities of the Exchequer; Floquet, Hist. du parlement de Normandie, 1840; Howard, Anciennes Lois des Français, Rouen, 1766; Brunner's Abhand. das Anglo-Normann, Erbfolg. Syst., 1869.

[2] Int. Law, Preface to 1st ed., citing Duck, de Usu ac Autor. Juris Rom., I. ii. c. 8, pars secunda, § 7.

the middle ages, is mainly made up of Anglo-Saxon statutes, which were in some respects analogous to the privileges (Volksrechte) of the other Germanic nations.—In the half century that intervened between Athelbert and William the Conqueror, those statutes were greatly extended, with some additions, it is true, from the canon law, but more from the Roman.—The Anglo-Saxon statutes were adopted at the popular legislatures (Witenagemote), in which the king consulted with the *Witan*, or eminent men of the land, as to the public welfare. These statutes (Domas) were in part the codification of old customary law, in part the imposition of new legal rules. According to Gneist,[1] followed by Brunner, the legal literature of that period is to be classed as follows:—

(1) The old Kent legislation, embracing the laws of Athelbert (560–616), on the subject of money paid to recompense injured parties and of acts of penitence; also the so-called laws of Hlothar and Cadric (673), relating to criminal law and process; and the laws of Wihtrad (696), relating to ecclesiastical and criminal topics.

(2) The laws of Ine, king of the West Saxons (688–727), remarkable, according to Brunner, for their wide range, as well as for the fact that West-Saxony was later the "caput regni et legum." (Leges Hen. I., c. 70.)

(3) From the period of the consolidated monarchy came the laws of Alfred of West-Saxony (871–901), probably about the close of his reign. They contain in part a republication of the laws of Athelbert, Offar, and Ine; rules in respect to the Wergeld, to oaths, and to suretyship, being contained in Alfred's treaty with the Danes (880–890). Of the two remaining laws of Edward the Elder, the older relates to sale, to perjury, and the withholding of rights; the later contains rules in respect to the preservation of the peace. Among the laws of Athelstan (924–940) are enumerated the *Concilium Greatangleagense*, the *Concilium Exoniense*, the *Concilium Fefreshhamense*, the *Concilium Thunresfeldense*, and the *Judicia civitatis Lundoniæ*, which gives, in detail, among other things, the rules relative to the

[1] Geschichte, etc., der Eng. Commem. Verfas., 1863; Self-Government, etc., 3d ed., 1871.

London guilds. The laws of Edmund (940–946) consist of th *Concilium Lundinense*, and the *Concilium Culintunense*. Und the laws of Edgar (959–975) are enumerated the *Constitutio c hundredis*, the *Concilium Wihtbordestanense*, and the *Concilium Andeferanense*. The laws of Athelred (978–1016) which clo the legislation of the Saxon kings, include the *Concilium Wudestockiense*, the constitutions of 1008 and 1014, the *Con cilium Wanetungense*, the treaty with the Danes, and th *Concilium Aenhamense*.

(4) The laws of Knut (1016–1035), which were adopted a the Concilium Wintoniense, and which are in main reproduc tions of the older Anglo-Saxon laws.

(5) Certain compilations made by private parties among th Saxons after the Norman Conquest, for the purpose of showing the Saxon law to the Norman authorities. Chief among thes are the so-called laws of Henry I. These begin with Henry I.'s charter of 1101, and with certain privileges granted to the city of London, with a short introduction by the editor. Then follow the decree of Burchard of Worms, the *lex Salica* and the *lex Rubruariorum*, the Frank Capitulations, and in peculiar fulness the Anglo-Saxon laws which the editor took from the Latin translation known as the *vetus versio*, although several Norman statutes are included in the compilation without noticing the distinction. That the work emanates from an ecclesiastic may be inferred from the use of phrases from the canon law and the omission of any from the Roman standards, as well as from the want of legal exactness and freedom in the style; and that the compiler was an Anglo-Saxon is clear from the fulness and sympathy with which the distinctive Anglo-Saxon jurisprudence is brought out.[1] The so-called laws of Edward the Confessor, which purport to give the result of an inquiry by William the Conqueror, through experts, as to Anglo Saxon laws, show, according to Dr. Brun-

[1] The time of publication is disputed. The impression for some time was that the book was published in the reign of Stephen or of Henry II.; but Liebermann, in his essay entitled Die Abfassungszeit der Leges Henrici I., in the Forschungen zur Deutschen Geschichte, xvi. 582 ff, argues with much force that the book as a whole was composed in the years 1108–1118.

ner, by internal evidence, that they were compiled by private hands, as a mere matter of personal occupation, about the year 1135.

(6) *Insulated memoranda and abstracts* of uncertain date, relative to the Wergeld, the oath, exorcism by ordeal, judicial forms, etc. Peculiar prominence is given by Brunner to the so-called *Senatus consultum de morticulis Walliae* (Geraednes betweox Dûnsêtan) a law regulating commerce, and to the *Rectitudines singularum personarum*, a treatise on the liens or burdens affecting particular kinds of property.

(7) *Records of Anglo-Saxon times*, partly in Latin and partly in Anglo-Saxon, many of which, according to Brunner, are corrupted or falsified, and all of which present many difficult questions of interpretation arising from our defective knowledge of the political relations of the Anglo-Saxon tribes. Peculiar value, however, is assigned to the record (bôc) of land which, when obtained in this way, became *Bocland*, and could be alienated by transfer of the record, *Urbuch*.[1]

[1] Brunner gives a reference to the literature on this topic which may be condensed as follows: Wilkins, Leges Anglo-Saxonicae . . cum notis, versione et glossario, London, 1721, which is reprinted by Canciani, Barbarorum Leges, iv., and by Howard, Traités sur les Coutumes Anglonormandes. A revised edition is given under the direction of the commissioners of the public records of the kingdom, with a compendious glossary, under the editorship, first of Mr. Price, and after his death of Mr. Thorpe, London, 1848. This edition is used by Reinhold Schmid, in his Gesetze der Angelsachsen (2d ed., 1858), with an excellent introduction and reliable glossary.

Extracts are given in Stubbs's Select Charters and other illustrations of English history, 2d ed., 1874. According to Brunner, the most complete collection of Anglo-Saxon records is given by Kemble, Codex diplomaticus aevi Saxonici, 6 vols., 1839–46; fac-similes of ancient charters in the British Museum, published 1873.

Reference is also made to Stobbe's Rechtsquellen, i. 194, and to Gneist's admirable Geschichte, etc., der Englischen Kommunalverfassung oder des Self-government, 2d ed., 1863; to Kemble's Anglo-Saxons in England, 2 vols., 1849; to Phillips, Geschichte des Angels. Rechts, 1825; to Gneist, Geschichte des Englischen Verwaltungsrechts, 2d ed., 1867; to Palgrave's Rise and Progress of the English Commonwealth, 1831–2; and to Stubbs's Constitutional History of England, a work to which Brunner justly assigns thorough historical research.

Much credit is also due to Essays on Anglo-Saxon Law, published in Boston in 1876, containing papers on the Courts of Law, by Henry Adams; on the Land Law, by H. Cabot Lodge; on the Family Law, by E. Young; and on Legal Procedure, by L. Laughlin. Reference is also made to an essay on Angelsäch-

§ 68. It was not the policy of William the Conqueror to supersede English by Norman law. The reasons are obvious. In the first place, Normandy had no settled code, as we have seen, to transplant. In the second place, so far as concerns Norman customs, they were the products in a large measure of Norman conditions, and not only were unsuited as a body to England, but an attempt to introduce them had probably raised a sullen and persistent revolt which would have cost William his crown. His policy was to bring about no such organic changes. A gradual approximation of the two systems, if they can be called such, took place, from several distinct causes. One was the fact that most of the officers appointed to administer justice were Normans, and desirous as they might be, in enforcing laws they found in operation, to give them due effect, it was impossible for them in so doing not to give the procedure a Norman flavor. Another circumstance was that the Normans who settled in the kingdom formed a distinct race, governed in some respects by their own customs, and hence when Norman and English customs stood side by side, it was natural, in the ultimate fusion that took place under Henry II., that the fittest should survive, and the Norman was often the fittest. It is true that much of the ultimate English law was taken from the Norman; but from the fact that after the Conquest the two systems continued side by side, there was at least some part of what was regarded as Norman which was really English.[1] As a matter of fact William I. took particular pains to declare the binding effect of the old law. His ordinances, with two exceptions, went to confirm that law. One of these exceptions is the establishment of distinct ecclesiastical courts, which followed the canon and Roman law as to marriage and succession.[2]

Anglo-Norman law a product of both factors.

sichischen Urkundenwesen, by Brunner, 1880.

[1] See Freeman's Norman Conquest, v. 397; Stubbs's Const Hist., i. 443.

[2] Blackstone (ii. c. 4) is in error in stating that William the Conqueror introduced the feudal system into England. If by the feudal system is meant that form of government which recognizes as intervening between the king and subject a series of tenants-in-chiefs each with absolute power over his particular domain, the feudal system, so far from being introduced by William was abolished by him. His policy was not particularism but imperialism; not disintegration but centralization; not the establishment but the demolition

Another sanctions the retention by the Normans of their distinctive customs; and it was under the shelter of this ordinance that the Norman wager of battle crept into English use, as distinguished from the old English trial by ordeal. Under William, Anglo-Saxon continued to be the language of the legislature and of the courts, though under William's successors this gave way, first to the Latin, and then to the French. The laws assigned to William the Conqueror (1066–1087), are as follows: (1) The Leges et consuetudines quas Wilhelmus rex post adquisitionem Angliae omni populo Anglorum concessit tenendas. This claims to be a compilation of Anglo-Saxon laws as reported by a special commission nominated by William, appending certain statutes of William defining the relation between Anglo-Saxons and Normans. (2) Wilhelmes cyninges asetnysse (William's statutes), a compilation in Anglo-Saxon giving the process to be used between Anglo-Saxon and Norman. (3) An ordinance on the separation of ecclesiastical and secular jurisdiction, giving in this preference to the Norman practice. The most curious of the records of William I. is the Doomsday Book, giving a report for fiscal purposes of the division of property in the realm. This was published in 1783, in two volumes, to which the Record commission, in 1816, added two additional volumes.[1]

of the authority of the great feudal lords. This, as is shown by Freeman (Nor. Conq., v. 366), he effected in the very assemby, or gemót, at Salisbury, which is cited as having introduced feudalism. On the other hand, feudal tenures of land (*i. e.*, holding land by military service), which existed in England long before the Conquest, were not interfered with by William, but, on the contrary, became almost universal, so far as concerned the crown. He treated all lay estates as technically forfeited, and then parcelled them out, generally to the old owners, sometimes to his own adherents, but always on condition of personal homage, establishing with each grantee a feudal relation to his sovereign. The very act, however, which made feudalism universal as a tenure of land, destroyed feudalism as a political system. The king swept away the authority of all intermediate feudal princes by the very act of creating universal direct feudal allegiance to himself.

[1] See Gneist, Englisches Verwaltungsrecht, i. 122.

Much information as to the business relations of the times is to be drawn from the fiscal records under the early Norman kings. Among these are specially to be noticed the Rolls of the Pipe, Rotuli Pipæ, edited by the record commission; editions of particular rolls being given by Hunter, 1833, 1844. The Rotulus Cancellarii for 1201–2 was published in London in 1833, and other

§ 69. In the modern sense, statutes are laws passed by the legislature having control of the realm; while the common law,

"Rotuli" by Hardy in 1835 and 1844. The Libertate Rolls, giving a statement of loans by Italian merchants to English kings in the thirteenth and fourteenth centuries, are given, with annotations by Edward A. Bond, in the 28th vol. of the publications of the London Society of Antiquaries (1840).

Of an anonymous treatise on English law, composed in the reign of Henry II., only the preface and a part of the first book remain. The preface contains the following summary of the work as given by the author himself: "Primus liber continet leges Anglicanas in Latinum translatas; secundus habet quædem scripta temporis nostra necessaria. Tertius est de statu et agendis causarum. Tertius est de furto et partibus ejus." Of this, however, all but the introduction and first book have disappeared, though some hopes of an entire restoration are expressed by Mr. Cooper in his "Account of the Most Important Public Records of Great Britain and the Publications of the Record Commissioners, 1832, ii. 412."

To an American author, Mr. M. W. Bigelow, of Boston, we owe a work entitled "Placita Anglo-Normannica, Law Cases from William I. to Richard I., preserved in historical records, 1879," which gives us judicial records from the oldest Anglo-Norman era, including royal writs and processed records of various kinds. And see Commentaries by Brunner in the Zeitschr. der Savigny Stiftung für Rechtsgeschichte, ii. 202.

The councils of Clarendon (1164) and of Northampton (1176), under Henry II. (1154–89), took a prominent part in the moulding of English jurisprudence. Under Henry II., the proof-jury, which had previously been introduced by him into Normandy, was established as a general institution in England, in this way leading to the final establishment of the present English jury system. He gave permanent shape, also, to the system of judicial circuits, by which *justiciarii itinerates*, justices of eyre (members generally of the queen's bench), visited in circuit all portions of the realm:[1] and these judges, who were privy councillors and commissioners to inquire into the condition of the circuit, as well as judicial officers, were supplied with instructions as to their duties, which were afterwards, in the reign of Richard I. (1189–1199), under the title of *Capitula Itineris*, put into formal shape. The court of exchequer, under Henry II., took its final form as a judicial bench, *bancum*, having jurisdiction primarily of matters concerning the revenue; and, under Richard I., a new court, ancillary to the exchequer, under the title of court of common pleas (*Communia Placita*), was established for the trial of ordinary issues. According to Gneist, as adopted by Brunner, England in this way took the precedence of the continent in placing the development of jurisprudence in the hands of technically educated judges, so that customary law was much more limited than at the same time in Germany.

The topic in the text is examined

[1] Brunner notices the similarity of this system with that of the *missi* under Charlemagne. The system is one which a capable executive would be likely to hit upon without regard to historical precedent.

though defined by a great authority as "statutes worn out by time," is regarded as that system of jurisprudence which, according to judicial precedent, governs each particular case as it arises. But this distinction is not observed by our old writers. With the continental jurists of the *renaissance*, *statuta* include all laws, no matter how imposed. The decrees of the Norman kings are classed as *constitutiones*, issued by the king, in most cases in consultation with the leading men of the realm, being sometimes called

Statutes as distinguished from common law.

with much fulness in the following work: Histoire du droit et des institutions politiques, civiles et judiciaires de l'Angleterre, comparés au droit et aux institutions de la France depuis leur origine jusqu'à nos jours. Par Ernest Glasson. Vols. 1–5. Paris, 1882, 1883. The author's principal object is the comparison of the French and English systems in their historical relations. The occupation of England by the Saxons in the fifth and sixth centuries, and the conquest by the Normans in the eleventh century, are designated as the formative epochs in the development of English jurisprudence. The distinction between Gaul and England, so far as concerns the Roman law, is found in the fact that in Gaul the local law, at the time of the barbarian invasion, had been for some time under the control of Roman institutions, while in England Roman institutions had not been deeply rooted.

This is thus put by M. Glasson, to adopt a translation given in the Edinburgh Review, July, 1883:—

"At the very outset of our comparative study of the institutions of our country and those of England, we are confronted by a difference which we can never lose sight of, even after this lapse of time. The barbarians who invade Gaul have the same manners, the same customs, the same laws, the same organization, as those of England; but these institutions, laws, and manners are immediately subjected to the powerful influence of Roman civilization. In their forests behind the Rhine the Franks had formed true democratic republics. Royalty was a gift of fortune; the tribe chose its magistrates; the nation voted upon all important questions of interest to the state. In Gaul we are witnesses of a very different spectacle. Monarchy is framed upon the Roman model. It becomes inviolable and transmissible, like a patrimony, instead of remaining elective. The king it is who governs, assisted by favorites gathered together at his court." (Vol. i. p. 75.)

By M. Glasson it is conceded that William the Conqueror had no desire, at least at the earlier stages of his reign, to substitute Norman law for English, though he afterwards yielded to the superior force of the Norman race and acquiesced in its necessary supremacy. According to Mr. Freeman, as we have seen, the Saxon race, laws, and language still remained as the base of the English system, merely assimilating such Norman institutions as were either arbitrarily imposed or were better suited to the altered conditions of the realm. But M. Glasson argues that there was a more radical revolution.

assizae;[1] and as *chartae*, or charters, unilateral edicts by the king, sometimes for the relief of grievances, sometimes for the conferring of privileges. Constitutions and charters, however, are frequently referred to as sources of the common law, on the supposition that they simply affirmed common law principles.[2] This is evidently the case with the *Magna Charta*, which has repeatedly been declared to be a mere reaffirmation of the common law. The English statutes, in their exact and technical sense, begin with the Statute or *Provisiones* of Merton, passed in the 20th of Henry III. (1235–6), which, in limiting descent of real estate to persons born in lawful wedlock, has done so much to determine subsequent English adjudication, and which, in several collections, precedes the Magna Charta and the Charta de foresta. To the reign of Henry III. is the statute of Marlebridge (1267) to be assigned. In the reign of Edward I. (1272–1307), called by Brunner "the English Justinian," a series of statutes were passed which form the germ of the English constitution as it now exists. An interesting summary of this legislation, with the concurrent executive action, is thus given by Gneist (Self-Government, i. 145), and adopted by Brunner: "As the centre of government was framed a permanent or continual council, afterwards called Privy Council, comprising the higher officers of state, including the archbishops, the chancellor, the treasurer, and the chief secretaries, together with other eminent functionaries. As a result of special royal invitation prelates and barons were periodically invited to this council, and formed with it the *Magnum Concilium*. Under Edward I. it became the usage to call into this assembly representatives of the *Communitates*, en-

[1] "Assiza," like the French "sittings," is an assemblage, or, derivatively, the decisions or decrees arrived at by such assemblage, with royal authority.

[2] The official report of statutes, as cited by Brunner, brings under the title of charter the letters-patent of Henry I. of 1101; Stephen's letter-patent *de libertates ecclesie Anglicane et regni* of 1136; that of John, *ut libere sint electiones totius Anglie* of 1214; the *Articuli Magne Charte Libertatum* of 1214; John's *Magna Charta* of June 15, 1215; the *Magna Charta* of Henry III. of 1216, ratified and extended in 1217, 1225; Henry III.'s *Charta de foresta*, of 1217, 1224–5, with its subsequent ratifications.

bracing both counties and cities, which, under Edward III., formed distinct corporations. In this way were organized upper and lower houses, under whose counsel and assistance were shaped the organic legislation of future centuries."[1]

Practice as to writs.

§ 70. The practice, which we have already noticed, of official writs issuing from the King's Bench, in substitution for the process by duel and purgation, was adopted in England, and limited to the *Curia Regis*.[2] From the time of Henry II. these writs (*brevia*) were accessible to all parties, applying to matters within the jurisdiction of the court; and the court of chancery assumed the practice of framing writs to suit particular exigencies.

If the object was to take the case to the *Curia Regis*, the writ was served by the *Vice-comes*, commanding the defendant to do justice, or to answer before the court. If the case was to be brought to trial, the *Vice-comes*, or sheriff, was required

[1] *Editions of Statutes.*—The laws of William I. are included in the ordinary English editions of Anglo-Saxon laws. Between that period and that in which the collection of English statutes formally begins, the laws adopted are to be found in Spelman's "Codex legum veterum statutorum regni Angliæ ab ingressa Guilemi I. usque ad. a. 9 Henrici II.," which includes royal ordinances, charters, privileges, and other executive documents. These, with other papers, were subsequently reproduced in Howard's "Anciennes Loix." A more accurate text, though without critical notes, is to be found in Stubbs's "Select Charters," 2d ed., 1874. Brunner, however, while acknowledging the great value of this work, argues that the task of giving "a critical edition of the older Anglo-Norman assizes" is still to be performed.

The English statutes, in the era of legislative acts down to 1714, were published between 1818 and 1828, in pursuance of a resolution of the house of commons, under the title: "The Statutes of the Realm, from original records and authentic manuscripts. Printed by command of his Majesty King George the Third, in pursuance of an address of the House of Commons of Great Britain, from the earliest times to the end of Queen Anne." 11 vols. in fol. Volume I. goes to 50 Edward III. In Coke's Institute the most important of the earlier statutes are given. Numerous editions of the statutes have been subsequently published for practitioners.

[2] The term "curia," as Sir F. Palgrave shows, was applied to all assemblages of councillors. It is probable that the *curia regis* was originally a judicial committee appointed to hear a particular case or a particular line of cases. In the withdrawal of English from the court, incident to the Norman Conquest, it was usually for a time composed mainly of Normans. But it was not a distinctively Norman institution, but a continuation, under a new name, of the prior English judicial system. See Freeman, Norman Conq., v. 878.

to summon a jury of recognitors.[1] This was a qualified adc tion of the old law of Ethelstan, by which the witnesses of particular fact were summoned to give testimony in re- tion to such fact. In the system as modified by Willia the recognitors or jurors give a verdict, it is true, on the own knowledge, but this verdict is made the basis of tl action of the court, while under Henry II. the verdict, thoug still on the jurors' own knowledge, is decisive. It was n until much later days that the rule grew up that jurors we to exclude their own knowledge in coming to a conclusio and act solely on the testimony of sworn witnesses.[2] So fa however, as process is concerned, no matter what might be tl cause of action, it could be vindicated by writ. Even courts of feudal lords, or lords of the manor, process issued the king's name. By the forms of the writs the actions we individuated, or, as Bracton said: "tot formulae breviam qu sunt genera actionum." The *brevia*, to adopt Brunner's ana ysis, were divided into *brevia formata* and *brevia magistrali* The *brevia formata* were those for which the form was alread fixed; the last were framed in chancery from analogies "i *consimili casu*," this being allowed to the plaintiff, "quia i novo casu novum remedium est apponendum," and the pra tice being expressly approved by the statute of Westminste 13 Ed. I., c. 24. From *brevia originalia*, by which suits a instituted, are also to be distinguished *brevia judicialia*, b which judgment was enforced.[3]

Peculiar value of ancient English records.

§ 71. *Records*, being the formal proceedings of courts authority emanating directly from the crown (suc courts being distinctively called courts of record were preserved with great care and invested with p culiar sanctity from the earliest period of the Angl Norman judiciary. In Queen Elizabeth's time a collection these records or protocols was made, which was published b the government in 1811, the title being: "Placitorum i

[1] See *supra*, §§ 14 *et seq.*

[2] See Freeman's Norman Conquest, v. 453.

[3] In Glanville will be found forms of ancient writs, which are also given in the Statutum Walliae of 1284, introdu ing royal process into Wales. Numero collections of writs were subsequent published in books of practice.

domo Capitulari Westmonasteriensi asservatorum abbrevatio temporibus regum Ric. I., Joh., Hen. III., Edw. I., Edw. II." Mr. Palgrave published, in 1835 (2 vols.) a compilation entitled "Rotuli Curiæ Regis; Rolls and records of the court held before the king's justiciars," giving the record of the proceedings before the curia regis and the judges in circuit, from Richard I. to John.

Authority of reports.

§ 72. *Reports*, according to a distinction taken at the earliest period of English judicial history, give the rulings of the courts in particular cases, with such a statement of facts as is necessary to explain the rulings; while records, as we have just seen, give only writs, pleadings, procedure, and formal entries directed by the court, excluding the reasons given by the judges for their decision. From the end of the reign of Edward I. to the end of the reign of Henry VIII., official salaried officers were appointed to report the decisions of the courts in the sense above given. From Edward II. to Henry VII. these reports were preserved, with a few gaps, under the title of Year Books, of which the first complete edition appeared in 1610. Reports of cases in the reign of Edward I. were published with English translations by Mr. Horwood, in 1863 and 1864.

Of law treatises.

§ 73. There are two periods in the development of national law in which treatises on its distinctive features are of peculiar value. The first is its formation, before reports of the proceedings of courts become numerous or authoritative. An observer of the customs of his country, who notes and systematizes them, thus lays the foundation on which subsequent adjudications rest. The question, for instance, which arose in early litigation in England was: What is the customary law on the topic under discussion, which customary law may the parties be presumed to have acted in submission to, or to have woven into their contract? This customary law the judges might have judicially noticed; or they might have had it proved before them; or they might have gathered it from text-books. This same practice exists in our own time where a litigation strikes a local custom as to which there have been no prior reported adjudications. In such cases the courts get at the local custom by judicially

noticing it, or by having it proved before them, or by having recourse to treatises in which it is stated, such treatises being *ante litem motam*. Treatises may sink in value when reports increase in comprehensiveness and authoritativeness. But there is a period, as reports multiply, in which the necessity of treatises, dealing with the principles of law, becomes again conspicuous. When there are no authoritative reports, or when reports are so numerous as to be beyond the reach of ordinary current study, then treatises become the primary standards of law. And in countries under the Roman law, in which the opinions of courts are more or less subordinated to the opinions of jurists, treatises embodying the opinions of jurists are always the primary standards from which the law is to be sought.

Dialogue de Scaccario.

§. 74. Of English law treatises the oldest which is noticed by Gneist and Brunner is the "Dialogus de Scaccario," which is an essay in the shape of a dialogue on the management of the royal exchequer, with references also to private procedure. According to Gneist, this work, which was composed in 1178–9 by Richard Fitz-Nigel, Archdeacon of Ely, and for forty years an officer of the royal treasury, "gives testimony to an early and ripe development of administrative power under the Norman system, and to a spirit of centralization and of official capacity of comprehension, to which nothing similar can be found in the Middle Ages." (Verwaltungsrecht, i. 201.) The work rests on an accurate knowledge of the practice of the Anglo-Norman exchequer, and was probably designed for the guidance of those concerned in its business.[1]

Glanville.

§ 75. *Glanville* ("Tractatus de legibus et consuetudinibus regni Angliae tempore R. Henrici secundi compositus justitiae gubernacula tenente Ranulpho de Glanvilla") is referred to by English writers as the earliest English text-book on law. This work was prepared between 1187 and

[1] The dialogue is to be found in Madox's History and Antiquities of the Exchequer, London, 1711 and 1769, and also in Stubbs's Select Charters, pp. 168 *et seq.* An examination of the position of the author and of the character of the work is to be found in Liebermann's Einleitung in den Dialogus de Scaccario, 1875.

1189, and is limited to an exposition of the practice in the King's Bench. Editions were published in England in 1554 and 1780. It is also given in Phillips's Englisher Rechtsgeschichte.

§ 76. *Bracton* (Henrici de Bracton, "De legibus et consuetudinibus Angliae libri quinque") comes next in order. Bracton. Our first difficulty is with his name. According to Horwood, in his preface to the Year Books of 20 and 21 Edward I., "Bratton" is the correct rendering; but by early manuscript copies it is given as Brycton and Breton as well as Bracton. But, be this as it may, he was a judge of the *curia regis* under Henry II., 1216–72, and his work, which appeared between 1256 and 1259, is that of a practised jurist. The purport of the work is to give the law and practice of the English courts, and is distinguished for its discriminating survey of principles and for its careful examination of English decisions. But while Bracton thus devotes himself to an exposition of the English law as he found and helped to mould it, he takes particular pains to introduce into his text such principles of the Roman law (as understood by him) as he deems pertinent. The Roman law had been taught in the twelfth century in Oxford, according to the scholastic interpretation then in vogue, and it was natural that Bracton should rely on it and on the canon law in all matters in which he was not controlled by positive English rulings. The probability is that he depended for this purpose on Azo's Summa to the Codex and to the Institutes, though there are traces of acquaintance with the decretals. Bracton appeared for the first time in print in 1569. A new and elaborate edition by Sir Travers Twiss appeared in three volumes in 1878.[1]

§ 77. *Fleta*, Seu commentarius juris Anglicani, is an anonymous treatise, composed, it is said, in 1290, which derives its name from the supposed fact that it was written in the Fleet Prison. "Fleta merito appellari poterit quia in Fleta, . . . fuit compositus." This work is mainly Fleta.

[1] To Güterbock we are indebted for an admirable essay (1862) on Bracton and his Relation to Roman Law, which has been translated with much ability by Mr. Brinton Coxe, of Philadelphia.

made up of condensed extracts from Bracton, with references to statutes and decisions since Bracton's time. The earliest printed editions of Fleta appeared in 1647 and 1685, to which were attached Selden's valuable treatise, "Dissertatio historica ad Fletam."

Gilbert of Thorton.

§ 78. *Gilbert of Thorton*, "Capitalis Justitiarius Angliae," under Edward I., was the author of a book called "Summa de legibus et Consuetudinibus Angliae," which appeared in 1292. The work, which appears to be an imperfect abstract of Bracton, has never been printed, and is known only by the notice given of it by Selden in his Dissertatio ad Fletam.

Britton.

§ 79. *Britton*, whom next we have to consider, was probably a clerk employed by Edward I. to give a statement of English law. The work is rather an official authoritative declaration of what the law is to be, than a scholastic exposition of what the law is. The propositions enounced are given not as the conclusions of a reasoner, but as the determinations of a prince; nous voloms, nous grauntoms, etc. From the fact that the statute "quia emptores" (18 Ed. I.), is spoken of as "une novele constitution," it is inferred that Britton's work was composed after 1290; and hence is later in date than Fleta. It is, as Brunner remarks, the oldest English law book in law French. An excellent edition was published by Mr. Nichols, in Oxford, 1865, in two volumes, with an English translation, and copious references to parallel passages in Bracton and Fleta.

Hengham.

§ 80. *Hengham's Summe magna et parva* is a comparatively brief essay also of the era of Edward I. It is published as an appendix to Fortescue's De laudibus legum Angliæ.

Progress from the fourteenth century.

§ 81. We have previously given an outline of Anglo-Saxon and of Anglo-Norman law. From the fourteenth century what may be called distinctively English law begins. From 4 Hen. VII. (1485–1509) the statutes were exclusively in English, and are printed as such consecutively in authorized editions.

The "proceedings and ordinances of the privy council, 10

Ric. II. (1386) to 33 Hen. VIII. (1641)," by Sir Harris Nicolas, in seven volumes, was published in 1834–7.

Parliamentary rolls, or registers of the formal proceedings of parliament (Rotuli Parlamentorum et petitiones et placita in parliamento), were published in six volumes in 1832. The official journal of the house of lords begins with 1 Hen. VIII; that of the house of commons with 1 Ed. VI.[1]

[1] In Brunner's statement of the literature on this topic the following summary is given of authorities in this line:—

Sir Matthew Hale's History of the Common Law, 2 vols. octavo, a work left incomplete by the author, of which the 6th edition, edited by Runnington, was published in 1820.

Reeves's History of English Law, a work for some time of high authority, of which an edition was published by Finlason in 1869. A German review of this edition is found in the Kritische Vierteljahrschrift, xiii. 228.

Crabb's History of English Law, 1829; Phillips's Englische Reichs- und Rechts-geschichte seit der Ankunft der Normannen, 2 vols., 1828, ending with 1189.

Stubbs's Constitutional History of England, a work of the highest merit and authority.

Savigny, Geschichte des Romischen Rechts in Mittelalter, iv. Anhang. 24.

Gundermunn's Englisches Privatrecht (1864), i., Einleitung treats the topic with great penetration and thoroughness.

Gneist's excellent treatises have been already referred to; and the political relations of the old English law are noticed by him on pages 56 and 157 of his "Self-Government."

Digby's introduction to the law of real property (1875) discusses the history of the law in that relation.

Spence's Equitable Jurisdiction of the Court of Chancery discusses the origin of the court of chancery.

A general summary of the history of English law is given in the introduction to Stephen's Blackstone, 8th ed.

See, also, Cooper's "Account of the most Important Public Records of Great Britain, and the publications of the Record Commissioners," London, 1832; Bigelow's History of Procedure in England during the Norman period; Pollock's Essays (1882), pp. 202 *et seq.* *Cf.* Bagehot on the English Constitution, 1870, and, by the same author, Physics and Politics, 1873; Brunner on the Entstehung der Schwurgerichte, 1872.

The high court of admiralty, established in the reign of Edward I., was organized in conformity with the forms and principles of the Roman law. Blackstone, iii. 68; Phillimore, Int. Law, i.

In matters of international law civilians were appealed to to give a binding decision; Elizabeth taking the course in reference to the complications in case of Mary Queen of Scots, and Cromwell in reference to the case of the mother of the Spanish ambassador, charged with murder, but for whom the privilege of diplomatic asylum was set up. From the time of the revolution of 1680 some of the most eminent civilians in Europe —Sir Leoline Jenkins, Sir George Lee, Sir William Wynne, Dr. Lawrence, Lord Stowell, and Sir R. Phillimore— have been Englishmen.

. The official reports of the courts terminate, as far as concerns the earlier English judicial history, with the reign of Henry VIII. The reports from the time of Elizabeth to a comparatively recent date were hors writing on their own responsibility, sometimes at ggestion of judges, sometimes as a matter of literary tion, sometimes as a matter of note-taking while on nch, but always without official salary, or appointment rown or parliament. The most eminent of these early ers is Coke, whose reports took so high a position that long time they were cited simply as "Rep." (*e. g.*, 7 all other reporters being cited by name. It would be t our present range to notice the long list of reporters ave given the proceedings of the English courts from ys of Coke to the present day—a list embracing some of st eminent literary men, as well as some of the most nd jurists who have adorned England. The names of orters are given by Clarke in Bibliotheca Legum, Lon- 810, and a detailed account of them, embracing the States as well as England, will be found in Mr. J. W. e's work on the Reports, of which the fourth edition blished in 1882.

. So far as concerns treatises on the principles of the law there was a lull from the close of the thirteenth century until the publication, towards the close of the fifteenth century, of Fortescue's treatise: "De Laudgum Angliae." John Fortescue had been chief justice gland under Henry VI. An adherent of the Lancaster , he followed in 1463 the queen and Prince Edward into n France, where he remained until the restoration of ster supremacy in 1471. When in exile he prepared instruction of his royal pupil, the treatise "De Laudgum Angliæ," the object being in part to vindicate the of constitutional monarchy as established in England, to show distinctive English jurisprudence, indicating nts of difference between this jurisprudence and that of man law as existing at the time in France. The work culiar sprightliness from being thrown into the shape of ue between the prince and his chancellor (which was

Fortescue's titular office), and it brings before us with peculiar prominence the land tenure of England and the intermediate process by which the jury, from being an instrument of proof, became the arbiter of questions of fact. An edition of Fortescue, with notes by Amos, was published in 1825, and an edition of peculiar excellence was published in Cincinnati in 1874.[1]

§ 84. Littleton's work on Tenures acquired for many years a commanding authority, in part from its own merits, in part from the reverence paid it by Coke, who declared it to be the most "perfect work ever written in any human science;" and that from the conclusions of Littleton he never permitted himself to dissent. According to Coke, Littleton's work dates back to the 14th of Edward IV. (1475); and it is built on the reports in the year books down to that era. It was one of the first books printed in England, having issued from the press in 1481, originally in law French, which was translated by Coke, with a commentary which has given the entire work an authority which has made it, within its range, supreme, and which constitutes it, even to the present day, the text-book to which students are directed for the purpose of learning the first principles of the law of tenures. Littleton.

§ 85. Of St. Jerman's "Dialogus de fundamentis legum Angliae et de conscientia," which dates back to the reign of Henry VIII., and which, in the English translation under the title "Doctor and Student," has had a wide circulation, the earliest printed edition was published in 1523. The object of the work is to give, in the shape of a dialogue between a doctor of divinity and a student of law, a popular exposition of distinctive English jurisprudence.—Stamford's "Pleas of the Crown" is the first English work we have on formal criminal law. Stamford, or "Staunford," as the name is sometimes given, was an English judge who died in 1558, and who prepared the work in question a few years before his death. It gives copious references to prior reports and text-books, and is much relied on by immediately subsequent English writers on St. Jerman. Stamford.

[1] See, as to Fortescue, 1 Steph. Hist. Cr. Law, 202.

criminal law. It is now superseded, as a manual of ancient law, by the works of Coke, Hale, and Hawkins.[1]

Hooker and Bacon.

§ 86. When we pass from the atmosphere of the scholastic jurists, whom we have been noticing, to that of the great writers of the era of Elizabeth, who now approach, it is like passing from a catacomb, in whose walls lie the dead, to a city teeming with energetic growth. Richard Hooker's life was almost coincident with the reigns of Mary and Elizabeth; he was born within a few months of Spencer, and only a few years before Bacon and Shakespeare. It is Hooker's misfortune that to many lawyers he is chiefly known by the somewhat rhetorical eulogy on law, which Austin, with his usual contempt of those with whose system he differs, calls "fustian;"[2] it is Hooker's merit that he was the first to announce the position now generally accepted by the historical school, that as man is never stationary and never perfect, so law can be never stationary and never perfect; but accompanies man in his progress, and enveloping him in its elastic mould, adapts itself to his changing and advancing conditions.—Hooker treats primarily, in his great work, of divine law, but what he says of the necessary mutability of divine law, so far as it relates to the government of man in matters not of dogmatic theology, applies *à fortiori* to human law. And the positions of Hooker, as to all law governing men in their changing social relations, are as follows:—

[1] See Foss, Judges, v. 390; Reeves, iii. 564.

[2] There may be a superficial inflation in the famous passage which Mr. Austin thus criticizes, but this appearance of inflation vanishes when we take in the whole context. To Hooker, at least as fully as to his great contemporaries, Bacon and Shakespeare, is due the credit of first exhibiting the full power of the English tongue for subtle distinction, for melodious rhythm, for sublime conception. But he cannot be studied piecemeal. To do him justice it is essential that his whole sweep should be taken into consideration. The flapping of an eagle's wings, if we should take in only a small section of his flight through the upper air, gives no idea of the loftiness and extent of the arc through which he soars. In the recognition of Hooker's majesty, of diction coupled with philosophic breadth of thought and subtle dialectic discrimination, we find agreed critics as different in their standpoints as Swift (Tatler, No. 230) and Hallam (Const. Hist. c. iv.).

(1) Whatever law thus applies to men in their social and municipal relations is mutable, just as human society is mutable.

(2) Law is to be adapted to the changing conditions of society.

(3) The present cannot be separated from the past nor the future from the present. So far as concerns the sense of right and the habits of social and domestic intercourse, there is as continuous a succession of generations as there are threads in a rope. "The act of a public society of men done five hundred years sithence (ago) standeth as theirs who presently are of the same societies, because corporations are immortal. *We were then alive in our predecessors, and they in their successors do live still.* Laws therefore human, of what kind soever (past or present), are available by consent." Laws bind us, therefore, not because they are imposed by the past, but because we are part of the past which consented to them. It is true that this view is sometimes spoken of as arbitrary and mystical. It undoubtedly is when it assumes an unreal identity of past and present generations. But the continuity here spoken of is not unreal. There is no person who aids either consciously or unconsciously in making the laws of a country whose opinions are not moulded by the past. No American of English descent, for instance, can separate himself from the barons who secured Magna Charta; from the parliamentary majority who forced the bill of rights on Charles I., or the *habeas corpus* statute on Charles II.; from the popular leaders who placed William III. on the throne; from the framers of the Declaration of Independence of 1776.[1]

(4) Law derives its authority not from its author, but from its adaptability to its object; even a law promulgated by God is mutable when relating to a mutable object.

(5) Reason and authority (including precedent) are co-ordinate ~~authorities~~ in the interpretation of law.

(6) Laws for social, ceremonial, and municipal government, so far from being of perpetual obligation, contain in them-

[1] This point is sustained in Webster's reply to Hayne, Webster's Works, iii. 316.

selves the energy of self-extension and self-modification.[1] Law is thus the product of conscience and reason and sense of need.[2]

(7) Reason (acting, when necessary, on proof) is essential to the verification, the interpretation, the application of law; and in all matters relating to human society, to the definition of law, to its modification and abolition.

(8) There is no such thing, in such matters, as arbitrary and inflexible *jure-divinoism;* "every law of God is a law of reason, and every law of reason is a law of God."[3]

Bacon was born in 1561, six years after the birth of Hooker, and died in 1626, surviving Hooker twenty-six years. The last, and in its political relation the least meritorious, portion of Bacon's life was in the reign of James I., and to the shaken fortunes as well as the pliant temper of Bacon may be attributed the occasional expressions of servility which escaped him in his later years. It does not appear that he and Hooker ever met. They were both endowed with the capacity of serene philosophic conception and of majestic expression. But the temptations of a court, to which Bacon succumbed, had never encircled Hooker; nor, from what we know of Hooker, is it probable that his simple and noble nature would have succumbed to any amount of courtly blandishments or threats. The atmospheres of the reigns of Elizabeth and James, also, were, so far as concerns freedom of thought, very different. In all matters not involving the political safety of the realm, Elizabeth allowed full play to thought; and there is nothing which illustrates this better than that the pulpit of Temple Church was held for a long time jointly by Hooker preaching liberalism of polity, and maintaining the claims of the Church of England by appeals to reason, and Travers, preaching *jure-divinoism* of polity, and holding the Church of England, in its

[1] See *supra*, § 6, note, for citation on this point.

[2] "To what he considered the fundamental mistake of the Puritans, an exaggerated and false theory of the purpose and function of Scripture as the exclusive guide of human conduct, he opposed his own more comprehensive theory of *a rule derived not from one alone, but from all the sources of light and truth with which man finds himself encompassed.*" Church's Introduc. to Hooker, Oxford, 1878, xvi.

[3] Ibid. xviii.

Erastianism, to be in conflict with scriptural rule. The very controversy to which we owe Hooker's great work, was one which James, irritatingly proscriptive in matters of philosophical speculation, while culpably negligent in practical politics, could not have tolerated. We do not find, therefore, in Bacon's works, nearly the whole of which were published in the reign of James, any such comprehensive vindication of liberty in the modification of law as we find in the pages of Hooker. Occasionally, on the other hand, we notice exaggerated enconiums of prerogative, and we meet once or twice with ascriptions of perfection and finality to the common law such as we are familiarized with in the writings of Coke and Blackstone. Yet, with all this, it is impossible to look through Bacon's works as a whole without seeing that this idea of the perfection of English law, as it then stood, is inconsistent with his philosophy; and that he held as fully as did Hooker to the doctrine of the spontaneous and yet unobserved growth of law *pari passu* with the growth of civilization.

Law, he tells us, meaning thereby the orderly correlation of causes and effects, is constant, but *laws* are mutable. "Perpetua lex est, nullam legum humanum ac positivam perpetuam esse."[1] Law is the author of sovereignty, not sovereignty of law.[2]

"Every medicine is an innovation; and he that will not apply new remedies must expect new evils, for time is the greatest of innovators." . . . "Time moveth so round that a froward retention of custom is as turbulent a thing as an innovation." . . . "*It was good, therefore, that men in their innovations would follow the example of time itself; which, indeed, innovateth greatly, but quietly, and by degrees ceases to be perceived.*"[3]

"The law cannot provide for all cases, but is adapted to such as generally occur. And time, according to the ancient saying, is the wisest of all things, and daily creates and invents new conditions of things."[4]

[1] Maxims, Reg. 19.

[2] Case of the Post-Nati of Scotland. See, for fuller citation, *supra*, § 63.

[3] Essay on Innovation.

[4] De Aug., Ap. 32; see Bagehot's Physics and Politics (1873), pp. 112 *et seq.*

"Antiquity, though in respect of us it was the elder, yet in respect of the world it was the younger. And truly, as we look for greater knowledge of human things and a riper judgment in the old man than in the young, because of his experience and of the number and variety of the things he has seen and heard and thought of; so, in like manner, from our age, if it but knew its strength, and chose to essay and exert it, much more might formerly be expected than from the ancient times. . . . It shows a feeble mind to grant so much to authors and yet deny time his rights, who is the author of authors, nay rather of authority. For rightly is truth called the daughter of time, not of authority."[1]

There is, he maintains, in science (taking the term in its widest scope) constant development so as to fit it to the growth of knowledge and of civilization. It was Bacon's office, he declares, to fit the law that governs human action to the successive conditions, and to do this, to establish the elasticity and self-developing power of law, "I propose to establish progressive degrees of certainty."[2]

"The state of knowledge is ever a democracy, and that prevaileth which is most agreeable to the senses and conceits of people."[3]

Not to Burke, therefore, but to Hooker and Bacon, are we to look for the first English exposition of historical evolution.

Coke.

§ 87. From Littleton to Coke, the transition, so far as concerns merely technical law, though covering one hundred and fifty years, seems slight. Within that period (1470–1620) few new principles were introduced into English jurisprudence, and the profound veneration felt by Coke for Littleton, united with the ascendency maintained by Coke over English lawyers of the old school, caused the formal scheme of tenure, as settled by Littleton, to remain in force until almost the beginning of the present century. Edward Coke was born in 1552, became attorney-general in 1594, was chief justice of the common pleas in 1606, and chief justice of the king's bench in 1613. In 1616 he fell into trouble with the court, and went into violent opposition, though

[1] Nov. Org., § 34.
[2] Nov. Org., Introd.
[3] Int. of Nat., 42.
[4] *Supra*, § 6.

it is difficult to say how much of this is attributable to his attachment to liberal principles, and how much to a certain dogged pugnacity which made it difficult for him to retain kindly relations to those with whom he was officially connected. In the domain of jurisprudence, however, so far as political questions were not involved, these antipathies did not sway his action. The old English law was wrought out by him with a fulness and subtlety which is marvellous, both for its copiousness and its exactness. His reports we have already noticed. His institutes for a long time were controlling authorities in the law of tenure, and will always command great interest, not merely for the historical research they exhibit, but for their extraordinary scholastic ability. They appeared in 1628, and consist of four parts. The first contains a commentary on Littleton, already noticed, and which was subsequently enriched by notes by Hargrave and Butler, eminent masters of the English law of tenures. Part II. comprises a somewhat complex commentary on Magna Charta and the older statutes. Part III. treats of the criminal law (Placita Coronæ), and holds with logical exactness to the hard lines of the older judges when dealing with English jurisprudence. Part IV. treats of the constitution of the courts, in the shape in which they were then developed. The ascendency for so long maintained by the first part, was far from being secured by its successors. Coke's exposition of Magna Charta and of the early statutes was tinged by his political views which, in the main, were those of the Tudor era; and the criminal law of which he treated, and the courts whose jurisdiction he discussed, gave way to the shock of reform long before any material alterations were attempted in the law of tenures. And even to the present day, knowledge of that law, as expounded by Coke, is essential to the understanding of the law of real estate as it now exists. The defect in his system is not that it was not fitted for his time, but that it was assumed to be fitted for all times. He claimed that the law laid down by Littleton and expounded by himself was a finality, being in itself perfect; and he treated with scorn the position of his great rival, Bacon, and his still greater contemporary, Hooker, that from the necessity of

things laws can no more continue in one stay than can the community on which they are imposed. In consequence of this want of elasticity and mobility, Coke's system of tenures, overflooded as it was in places by the stream of change, when it at last gave way, gave way, like an ice gorge, in a mass.

Blackstone.

§ 88. With Blackstone we must close our notice of the English law authors of the old school. Between him and those whom we have already mentioned intervened Hale and Hawkins, but the chief works of these great writers are on criminal law, a special branch of jurisprudence in which the older books have, beyond all others, lost their authoritativeness. Comyns, also, published in 1744 a very useful Digest of the Laws of England, and by Viner a valuable abridgment of the same laws was shortly afterwards issued. Blackstone, however, virtually terminates the older epoch of English law literature, and is the last great teacher of the school of English lawyers who held that the English law, after a gestation running back indefinitely through times unknown, had reached a perfection which, though differently interpreted by Littleton, by Coke, by Hale, as well as by Blackstone, had reached a perfection which it would be sacrilege to touch. This old law, both in its narrowness and its breadth, its noble recognition of the main safeguards of freedom and its fidelity to precedent, yet interpreting precedent with a rigid logical subtlety such as is surpassed in no other branch of literature, is preserved in a style of singular grace and purity in the pages of Blackstone. He was born in 1723, and after practising as counsel for some time, became professor of law in Oxford, in a chair established by Viner. He subsequently was a member of parliament, and a judge of the court of common pleas; beginning his political life as a whig, and as an adherent of the distinctive principles which placed the Hanover succession on the English throne, but afterwards modifying these views so as to approach the toryism which came in with the reign of George III. The Commentaries, which grew from his academical lectures ,constitute a systematic exposition of English law. The first volume purports to treat of the rights of persons, so far as their civil relations are concerned;

the second, of the rights of things, including contracts; the third, of private wrongs; and the fourth, of public wrongs or crimes. In this scheme, the defectiveness of whose analysis will be hereafter pointed out, it will be at once seen that ecclesiastical law and international law have no part, and therefore the work does not treat of the law in force in England as a whole, though it exhibits the then English common law with perspicuity and completeness. The first edition was published in 1765, and in the author's lifetime several subsequent editions appeared, each edition with emendations, sometimes of style, sometimes of substance; the object being in one instance to adapt the text to the author's modified political views. It is the peculiar charm of the work that, though substantially accurate, it was written, not for legal experts, but for students of all classes; and that, while avoiding the barbarisms in which the old lawyers delighted, it is presented in a style which educated men of all classes may not only understand but admire. The Commentaries of Blackstone are therefore invaluable, not merely as an exposition of the English common law as it stood at the end of the last century, but as a classic of high order in English literature. ץ

§ 89. That Blackstone rejected the *jure divino* theory of legitimacy, and based government on consent, has been already noticed;[1] and though the terms in which the consensual origin of government was stated in his first edition were afterwards somewhat modified, yet there is throughout his work no assertion on this specific topic to which a liberal critic can object. The very optimism,[2] which we shall have occasion to further notice as in other respects his chief defect, kept him in this relation on the liberal platform. It was impossible for him to be a loyal adherent of the house of Hanover and yet hold to *jure divino* legitimacy. If there be such a thing as *jure divino* legitimacy, if the crown of England were settled from time immemorial on a particular family on the basis of titular primogeniture, then it is clear that the house of Hanover is not entitled to the English crown. To sustain the title of the

Objections based on Blackstone's optimism and finality.

[1] *Supra*, § 52.

[2] See ibid.

house of Hanover it is necessary to maintain the right of the people of England to depose one dynasty and to establish in its place another, and this Blackstone did. There was no other way in which the revolution of 1688, and the subsequent settlement of the crown in reversion on the Princess Sophia and her descendants, could be vindicated; and this right of revolution, asserted as it was by the convention which gave the crown to William and Mary, could not be disputed without disputing the title of George III. This title, revolutionary as it was in origin, Blackstone maintained; but here he stopped. His temperament was naturally amiable, easy, and optimistic &c. He was promoted to high dignities under the existing system with which he was naturally content. Although he had to accept, as a man of sense who could not dispute history, the revolution on which alone the existing government could be based, he had the abhorrence of change natural to a conservative and to an epicurean. The revolution of 1688 had to be tolerated, but it was to be a finality. It was true that parliamentary constituencies which were large in the revolution era had dwindled to almost ciphers, and that, since that era, vast and powerful cities had grown up which were not recognized as constituencies. It was true that the exigencies of business demanded that land should be made subject to the payment of debts; that seals should be stripped of their magical immunities; that imprisonment for debt, proved to be as injurious to the community as it was cruel to the debtor, should be abolished; that the infliction of capital punishment on minor felonies had become so odious to the popular mind that it was difficult to convict of such felonies, so that the barbarity of the punishment had become a protection for the crime. It was true, also, that to adapt the practice of the common law to the conditions of the eighteenth century it had to be overlaid with multitudes of fictions, some of them, as in the action of ejectment, as expensive as they were arbitrary; and that litigation, from the costs which from this and other reasons were imposed on it, had become the poor man's oppressor instead of being his champion, and the rich man's tool instead of being his master. All these things Blackstone must have seen; but reform, according to his theory, had exhausted

itself in the revolution of 1688, and the system which was then produced was to be accepted as perpetual. To vindicate this system in all its details—in the abuses worked into it by the change of conditions, as well as in its original virtues and infirmities—he devoted research in English history remarkable in his day, a knowledge almost perfect of the English law of his period, and a style whose uniform elegance and grace are not made less attractive by marks of humor which show that with all his urbane optimism he was not blind to some of the absurdities of the system which in all respects he would extol, and in all respects he would retain. His work, therefore, admirable as it is as a historical narrative of prior law and as a systematic exposition of the law as it was in his own day, makes no pretence of setting forth the law as it would be when stripped of the obsolete costume, in some respects fantastic, in some respects hideous, in which it was in England then temporarily arrayed.[1]

§ 90. As Blackstone may be regarded as at once the most graceful expositor and the most efficient defender of the old system of English law, so Bentham may be looked upon as leading in the assaults by which its abuses were brought conspicuously before the public eye, and in the reforms by which, in late years, it has been radically changed.[2] Jeremy Bentham was born of wealthy parentage in London, in 1748. He took the degree at Cambridge of Master of Arts, in 1768, became in 1772 barrister at Lincoln's Inn, and then travelled in the East, in Russia, and Germany. He was elected a member of the French Institute in 1802; and was for years the centre of a society of utilitarian philosophers and law reformers to whom his wealth enabled him to offer genial hospitality, his eccentricities constant entertainment, and his genius vigorous stimulus. His scheme of utility will be noticed hereafter more fully; it is enough here to state that the acceptance of the scheme as the exclusive basis on which society is to be worked is by no

Bentham as the champion of reform.

[1] For Austin's criticisms on Blackstone see *infra*, § 92; and see, also, strictures in 1 Steph. Hist. Cr. Law, 214.

[2] As to Bentham's views of the origin of law, see *supra*, § 56.

is essential to an acceptance of the reforms he proposed. his reform movements may be taken separately from his tarian philosophy, is shown by the fact that among those accepted his leadership in the work of law reform, may nentioned not merely J. S. Mill and Austin, who were exponents of utilitarianism, but Romilly, the first equity t of his day, who cared little for speculative philosophy; ugham, among whose multifarious works is one on natural logy, which is in direct antagonism with utilitarianism; Denman, who, during his spotless career in parliament, on the bench, over and over again asserted the supremacy at "moral sense," or "conscience" the existence of which rinaire utilitarians deny.—In a large measure Bentham's ence was through conversation, and it was a long time be- his works became known beyond the circle of his imme- disciples. They are as follows: A fragment on Govern- t, London, 1776; Essay on Political Tactics, London, 1791; ptic or the Inspection House, London, 1791; Draught of le for the Organization of the Judicial Establishment of ce, London, 1792; Traités de Législation civile et pénale, Dumont, Paris, 1802; Théorie des peines et des récompenses, s, 1812;[1] Introduction to the Principles of Morals and slation, London, 1789, 1823; Papers relative to Codification Public Instruction, London, 1817; Church of Englandism nined, 1818; Codification Proposals to all Nations, 1822; onale of Judicial Evidence especially applied to English tice, London, 1827, which is the basis of Dumont's Traité preuves Judiciares, Paris, 1823, and which is also largely in Best's Law of Evidence, its principal suggestions being incorporated in English legislation; Constitutional Code he use of all Nations, 1830; On Death Punishment, 1821. have, also, a complete English edition of Bentham's s, embracing his correspondence, published by Bowring, 838, of which a French edition was published in Brussels 840, under the title of "Œuvres de Bentham." Bentham's conspicuous English expositor is Austin, to be presently

[1] The two last works were prepared ch by Dumont, from Bentham's and Dumont's rendering afterwards translated into English and German.

more fully noticed, who follows, however, in some respects, as will be seen, an independent line. In Germany, a valuable summary of Bentham's views on criminal law was given in 1839, by Hepp, under the title of "Bentham's Grundsätze der Criminal Politik," published in Tübingen in 1839.—It may be said of Bentham, that when he began to write on politics and law, the parliamentary and judicial system of England was a mass of abuses and anachronisms. When he ceased to write these abuses and anachronisms were either removed or doomed; and now, through the movement he started, English law has been remodelled in a way that fairly adapts it in the main to the requirement of English life in the present day. And the reforms thus made in England have been made under the same impulse in the United States. Yet it is an interesting fact, that in the United States, while Blackstone's Commentaries, exhibiting a law now in the main obsolete, have been republished in numerous editions, some of them edited by lawyers of the highest order, and are to be found in every library in which law is represented, none of Bentham's works have been issued from the press. That which is obsolete has been retained in our literature; the works which first pointed out errors and anachronisms in the old law have never found a place on our book-shelves. The reason may be found in part in the mode of presentation. Blackstone's style is graceful, his arrangement simple, his scheme within the range of ordinary study. Bentham's style, on the other hand, though picturesque and vivid, is jagged and abrupt; of law as a general theme he gives no analysis which an ordinary reader can master; his dialect requires a distinct preparation to be understood; his works are so numerous and so disjointed and so charged with thought that to master them requires long and severe study. Another reason may, perhaps, be found in the fact of the objections, to be hereafter more fully noticed, felt by many among those on whom the duty of teaching is imposed, to the utilitarian scheme which, though by no means essential to Bentham's system of law reform, he weaves into that system. This, however, would not prevent the dissemination in this country of at least a condensed summary of Bentham's chief works, analogous to those which have frequently been

given us of the Commentaries of Blackstone. And the reason why this has not been done may perhaps be found in the fact that to give us Bentham's conclusions would be to give us the law as it actually is, while for us to study his arguments would be to revive a battle that has been already won. Blackstone's Commentaries, therefore, will continue to be read not only as giving the law as it was, but as showing the historical basis of the law as it is. Bentham's works, in their crude shape, are not read, because, in part from the sympathetic assimilation of our common law with his conclusions, in part from their adoption in legislation, the reforms for which he contended have become part of our political and legal existence.

Austin as a leader of juridical thought.

§ 91. The date of the birth of John Austin is not given by his wife in the interesting biography she prefixed to his treatise on the "Province of Jurisprudence;" but it is stated that at an early age he entered the army, in which he served for five years, and that he was called to the bar in 1818. At the bar, as is stated by his wife, "it became in no long time evident to one who watched him with keenest anxiety that he would not succeed." . . "His health was delicate; he was subject to feverish attacks which left him in a state of extreme debility and prostration; and as those attacks were brought on by either physical or moral causes, nothing could be worse for him than the hurry of practice, or the close air and continuous excitement of a court of law. . . Nervous and sensitive in the highest degree, he was totally deficient in readiness, in audacity, in self-complacency, and in reliance on the superiority of which he was conscious, but which oppressed rather than animated him." "After a vain struggle, in which his health and spirits suffered severely, he gave up practice in the year 1825." In 1826, when the University of London was founded, a chair of jurisprudence was established to which Mr. Austin was elected; and he immediately proceeded to Germany to prepare himself for his professional duties. He took up his residence in 1827 at Bonn, where then dwelt Niebuhr, Mackeldey, Heffter, Arndt, and Brandis, and where he remained a year, familiarizing himself, as far as it was practicable to do in that period,

with German legal literature. In 1829 he began his course of lectures at London University, and it opened brilliantly, the class not only being large, but including men of even then recognized eminence, such as Mr. J. S. Mill, who were drawn to Mr. Austin in part by sympathy with his philosophical views, in part by admiration for his abilities as exhibited in conversation with his friends. For while, as his wife, a critic of singular accuracy, says, "he had a natural and powerful eloquence (when he allowed himself to give way to it) which was calculated to rivet the attention and fix itself on the memory," "this was far more striking in conversation than in his written lectures." The defects of style in these lectures will be hereafter noticed; it is enough at this point to say that his deficiencies in this respect are attributed by Mrs. Austin to "the severity of his taste and his habitual resolution to sacrifice everything to clearness and precision" which "led him to rescind every word or expression which did not, in his opinion, subserve these ends." But it was soon found that his lectures, however high their tone of thought, did not deal sufficiently with practical existing jurisprudence to enable them to prepare students for the bar. The chair had no endowment; it was dependent for support on the fees of attendants, and the number of attendants diminished until Mr. Austin, discouraged by this apparent failure, and without any adequate support, resigned his chair. "This," so speaks Mrs. Austin, "was the real and irremediable calamity of his life,—the blow from which he never recovered." In June, 1832, he gave his last lecture, and then the leading lectures in the course were published by him, without, however, attracting much immediate public attention. In 1834, under the auspices of his friend Mr. Bickersteth, afterward Lord Langdale, he was appointed to deliver a course of lectures on jurisprudence, at the Inner Temple. Here, again, he failed, partly from growing ill health, partly from the inadequacy of his method of instruction for a practical training for the bar. He retired to the Continent, where he could live inexpensively, and where his morbid consciousness of "neglect, and a sort of contemptuous wonder," of which his wife speaks, would not so stiflingly oppress him; but after a residence at Boulogne for a

year and a half, he was appointed, in connection with Mr. (afterwards Sir) George Cornewall Lewis, royal commissioner to Malta, to report on the grievances of which the residents of that island complained. This mission, however, being soon closed by the government, Mr. Austin retired in broken health to Germany, spending summer after summer at Carlsbad and the winters at Dresden and Berlin, where he had the opportunity of much intercourse with Savigny. In 1844 he removed to Paris, where he was elected by the Institute a corresponding member of the moral and political class. The revolution of 1848 drove him from Paris; and "he took a cottage at Weybridge, in Surrey," where he passed twelve years of retirement, "rarely interrupted and never uninteresting or wearisome." It is a remarkable fact that as he grew older, while he continued to cling with increased tenacity to utility as the object of law, his distrust of popular government, in which he followed Hobbes, became more and more marked. His own failure to obtain a popular hearing may have been one of the causes of this tendency; but be this as it may, his theory that from the sovereign all law is to descend to the people acquired to his eye, as he grew older, a still more commanding importance, though according to his view a sovereign, to be truly efficient, must enlist in his support an aristocracy of intellect and wealth.[1] Yet he shrank from

[1] "The idea," says Mrs. Austin, "of popular legislation was to him as alarming as it was absurd; and it was precisely on account of the disastrous consequences which he was certain must result from it to the people themselves, that he felt indignant at the uses made of their ignorance, and the unmanly affectation of deference to their wishes by those whose duty it was to enlighten and guide them." Nor was this all. The liberalism of the past became as distasteful to him as the liberalism of the present; and on not only the French but the American Revolution he looked with disapproval. See Letters of Sir Geo. C. Lewis, 105, 106, 108. That he should have misunderstood the effect of the American Revolution cannot surprise us when we meet such a statement as the following in the text even of the last (1879) edition of his lectures (ii. 678); "Colonel (Achille) Murat, son of the late king of Naples, who, curiously enough, has practised as an English barrister in the Floridas, and seems to have a very pretty knowledge of English law, says that the acts of the American state legislatures, or at least the acts of the legislatures of those states in which he has resided, are habitually overruled by the judges and the bar. At the beginning of every term they meet and settle by which of the acts of the preceding session of the

either the construction of a new work in which his entire system could be exhibited, or from republishing his lectures, of which a second edition had been called for. This task was after his death undertaken by his widow, who, aside from her devotion to his memory and familiarity with the materials left behind him, possessed a literary skill to which he never approached. The title of the work as first published was, "The Province of Jurisprudence Determined." This was retained in its second edition, by Mrs. Austin, which appeared in 1861. In 1863 a third edition was published by Mrs. Austin. In 1879 a fourth edition was issued under the editorship of Mr. Robert Campbell, who had the advantage of "notes of the original lectures which have been preserved by Mr. J. S. Mill, and were kindly furnished by him to the late Mrs. Austin for the purpose of a new edition which she meditated but did not live to complete." Mr. Robert Campbell has also published a "Students' edition of Austin's Lectures on Jurisprudence," and Mr. Gordon Campbell an "Analysis of Austin's Lectures on Jurisprudence," a work of singular acuteness and perspicacity. Popular Mr. Austin's works have never been. "He had not the slightest idea," so his wife states in the touching and loyal biography already cited, "of rendering his subject popular or easy." But among those who have sought to deal with the philosophy of jurisprudence, he has awakened an interest beyond that of any English writer of his day.

§ 92. Such being the admitted value of Austin's lectures, some of their defects may next be noticed. And the first is, that bold as is the analysis given by him of jurisprudence in general, and pregnant as it is with valuable thought, there are defects about some of its details which greatly diminish its authority. Thus we have in reference to criminal law the following extraordinary statement:[1] "*Mala in se* are offences against useful laws; *mala pro-*

Defectiveness of his analysis.

legislature they will abide; and such is the general conviction of the incapacity of the state legislatures, and of the comparative capacity and the experience of the judges and the bar, that the public habitually acquiesce in this proceeding." Mr. Achille Murat was ready enough to give mystifying accounts of his adventures: the strange thing is that such an account should have been accepted by Mr. Austin as true.

[1] Lectures (1879), ii. 591.

hibita or *quia prohibita* are mischievous offences against laws which are themselves useless or mischievous." This, he tells us, is "according to the principle of utility;" and this principle, as will presently be seen, is the index of the divine commands. Putting aside the unreasonableness of the distinction, it is without a particle of authority. What the books unite in saying is, that *mala prohibita* are offences against statutory law and *mala in se* are offences against common or customary law, or which, from their enormity, are punishable on the general principles of common or customary law, though there are no prior decisions by which they are specifically condemned. The distinction may be worthless, since offences against customary or common law are as much *mala prohibita* as offences against statutory law. But, if worth anything, it cannot be made to rest on the utility or non-utility of the law which is infringed; and to so regard it might produce disastrous consequences. Thus, if utility be the test of the validity of common law penal rules, so that no offences could be regarded as *mala in se* unless the laws prohibiting such offences are "useful," then the court, on the trial of common law offences would have to make the guilt of the defendant depend upon the "utility" of the law.[1]

Even more open to criticism is Austin's general analysis of "Rights." By Blackstone, as will be recollected, "Rights" are classified as "Rights of Persons" and "Rights of Things." To this it has been justly objected that "Things" have no "Rights," except in connection with persons, and that so far, therefore, from "Things" being properly put in antithesis to persons, the proper division should be, "Persons in relation to themselves and each other," and "Persons in relation to Things."[2] Austin, after reprobating with his usual vehemence Blackstone's classification, proposes the following, which he declares to be exhaustive:—

"1°. Obligation considered universally, I would style '*offices*' or '*duties*.'

[1] This is illustrated by what is said by Mr. Austin in the preceding page: that "to import goods that are prohibited, for the absurd and mischievous purpose of protecting domestic manufactures, is a perfectly innocent act, with reference to the specific consequences."

[2] *Supra*, § 9.

"2°. Rights which avail against persons *generally* or *universally*, I would style 'Rights *in rem*.'

"3°. Rights which avail against persons certain or determinate, I would style 'Rights *in personam*.'

"4°. Obligations which are incumbent upon persons generally or universally, I would style 'offices' or 'duties.'

"5°. To those which are incumbent upon persons *certain* or *determinate*, I would appropriate the term 'obligations.'"[1]

But defective as is Blackstone's classification, the above is open to even greater objections. Why the titles (1°) and (4°) should be separated is inexplicable. By (1°) "offices or duties" is the term assigned to "obligations considered universally;" by (4°) the same term is assigned to "obligations incumbent upon persons generally or universally." The only conclusion we are justified in accepting is, that "obligations considered universally" are the equivalents of "obligations which are incumbent upon persons generally or universally;" but, if so, it is difficult to understand why they should be placed under separate titles. This, however, may be an objection of form. That which exists to (2°) and (3°) is an objection of substance. To divide rights into rights of persons in relation to themselves and each other, and persons in relation to things, gives us an analysis by which not only is the study of law simplified, but the bearings of its chief factors are elucidated. It is hard to see how the division of rights given above into "rights against persons generally or universally," and "rights against persons certain or determinate," can do else than mislead. If the division include, as it logically should, a definition, it means that rights which "avail against persons generally or universally" do not "avail against persons certain or determinate," which is incorrect; and it would imply that universal rights are in no cases the generalization of particular rights, which in many cases they are. Nor can the term "rights *in rem*" be applied to universal rights without running counter to the nomenclature of both Roman and English law, by which a right *in rem* is understood to mean an immediate right of a person to a particular thing, no matter by whom such thing may be owned.

[1] Op. cit., p. 992.

§ 93. It has already been noticed that Austin's theory of the origin and authority of law cannot be reconciled with the assignment of authority to custom recognized by both English and Roman common law.[1] According to Austin, as we have seen, law, to be binding, must be "set by political superiors."[2] A custom if not "set by political superiors," therefore, is not law until in some way adopted by legislature or judiciary, and then the legal effect only dates from such adoption. But the Roman common law is based, not upon legislative acts, nor on sovereign decree; since, although we have in abundance laws made by the senate and decrees issued by the emperors, yet these statutes and decrees all presuppose law which was obligatory prior to such statutes and decrees. The Digest is full of statements which verify the existence of such prior law. The law, it is declared, is to a particular effect. "It is," not "it shall be;" the statement reached the past, and does not create for the future. So with the English common law.[3] Mistaken as was Blackstone in assigning immobility and finality to that law, he was unquestionably correct in saying that when courts recognize a custom as law, they do not make new law, but simply recognize an old law which has been in force for an indefinite period. Any other view would confound the functions of courts and legislatures, and make the courts, not the verifiers of laws already in existence, but the makers of laws hereafter to exist. It shows how strong were the absolutist tendencies of Austin that he ignored this distinction between the law-making and the law-declaring departments of government, though in so doing he placed himself in flat opposition to both Roman and English standards.

Austin's theory of the authority of origin of law unsatisfactory.

§ 94. It may be said that there is nothing in the theory that laws, to bind, must be set by a political superior, inconsistent with popular rights, since this political superior may be a democracy voting by a plebiscite as well as an emperor decreeing by an edict. But a plebiscite of a democracy is as incompatible

And so of his view of development of law.

[1] *Supra*, §§ 2, 18, 23, 26.

[2] Aust., Lect. on Jur., 4th ed., pp. 318 *et seq.*

[3] See, fully, *supra*, §§ 14, 15.

with an instinctive and healthy popular development of law as is an imperial edict.[1] Some of the most irrational and despotic laws ever passed have been those adopted hurriedly by popular vote. Nor is this all. Neither democratic nor despotic legislation can stand unless it accords with the tone and conscience of the people on whom the legislation acts.[2] The only laws that operate healthily and endure permanently are those that emanate, as it were, instinctively yet gradually from the people themselves. The process, it is true, is one of time, as we have seen,[3] and not one of ostensible agitation and discussion. It "cometh not with observation,"[4] it is like the growth of language, transcending sovereign power to which its origin is not due, and in a contest with which, though it may be temporarily suppressed, it must come out ultimately victor. There are, in fact, points of similitude between law and language worthy of particular notice. Both have their origin beyond the memory of man. Both absorb various currents, "our laws," as Lord Bacon says, "being as mixed as our language."[5] Attempts to force foreign systems of law on a people have proved to be as abortive as attempts to force on a people a foreign language. The statutes, for instance, imposing on England distinctive features of canon law which were inconsistent with the genius of the English people were as ineffective and short-lived as the statutes requiring that the proceedings of the English courts should be in French. The only permanent, as well as the only appropriate and elastic system of law, like the only permanent, appropriate, and elastic system of language, is, as we have seen,[6] that which springs from the people and ascends from them to their sovereign, not that which their sovereign imposes on them. To the people we, of English descent, owe our common English language, with its manifold modulations; with its harmonious assimilation of whatever was good in the dialects of successive occupants of English soil, and of whatever is heroic and sublime and refined and tender in the past; with its subtle capacity for the rejection of whatever becomes

[1] *Supra*, § 28; *infra*, § 362.
[2] *Supra*, § 27.
[3] *Supra*, §§ 30, 61.
[4] *Supra*, §§ 14, 61.
[5] See, as to analogy with the formation of private ways, *supra*, § 61.
[6] *Supra*, § 59.

ungracious or awkward; with its multitudinous correlations which answer to each other, not because it is so ordained by a sovereign, for no sovereign could construct a system so infinitely expanded and yet so delicately complicated, but because it springs instinctively from the condition of things as they are. So it is with language and so it is with law. To hold that law is created by a sovereign is as unreasonable and as inconsistent with our traditions as to hold that language is created by a sovereign. And to say that no law is to bind until established by a sovereign, besides, as has been noticed, making the judiciary not law interpreters but law inventors, and ignoring the rights of the people as a body to gradually evolve their own laws, is to contradict the traditions both of Roman and English law.

Defective in leaving out of sight the moral sense.

§ 95. Another defect of the writers of the analytical school is to be found in their ignoring all motives except self-interest. The consequence is serious when we come to the adjustment of criminal and civil penalties for wrongs. If self-interest is the sole motive to action, it may be properly argued that the only way to prevent wrong is to appeal to self-interest. But self-interest is not the sole motive to wrong or impulse to right. In the first place, conscience, or, in other words, the moral sense, is a powerful and often a supreme factor in the determination of action, public as well as private. Neither south nor north, for instance, in the late civil war, was prompted to engage in that tremendous conflict by self-interest; what led the south to insist on the right to secede, what led the north to resist this claim, was, each side may now concede, the belief that, by such action, prerogatives more precious than all the wealth of the world would be secured. Noble acts of the highest grade, also, such as we witness in the career of Washington, are free from the taint of self-interest; in fact, when self-interest is the controlling motive, the act, at least to the actor himself, ceases to be noble. If, also, men were governed by self-interest, few crimes would be committed, since there are few crimes which are not prejudicial to the party committing them. The scheme, therefore, of the writers of the analytical school, in attaching exclusive

consequence to self-interest, drops out of sight what are really the more generous and more ennobling, as well as more effective, agencies for moulding human action. Men are impelled to right and deterred from wrong, are induced to perform with delicate honor their business engagements, and discharge with affectionate solicitude their social and family duties, much more from a reverence for right and horror of wrong than from a calculation of the chances of benefit or punishment. Just as it is by the fireside, so it is in the community at large: an exclusive appeal to mere self-interest, instead of to the nobler qualities of nature, debases those to whom it is addressed.[1]

Rejection of moral sense not consistent with common law rulings..

§ 96. With the psychological grounds on which the existence of "conscience" or "moral sense" may be assailed or defended, we have at present nothing to do. It is, as will be hereafter seen,[2] not necessary, in order to sustain the theory of a moral sense, that it should have been coeval with the origin of the human race. Such may have been the case, or it may have gradually grown up under social surroundings, modifying inherited tendencies. But that it actually exists as an energy of greater or less power in every human breast, is maintained by so strong a chain of specialists in ethics and psychology, and is so generally assented to on the evidence of their own consciousness by those who are not such specialists, that it is not strange that it should be found over and over again among the postulates on which the common law rests. And such is the case. On this is based the line of decisions by which the oath required from witnesses is moulded. A wit-

[1] "Happiness is one of the most indeterminate and undefinable words in the language, and what are the conditions of 'the greatest possible happiness' no one can precisely say. No two nations, perhaps no two individuals, would find them the same." (Lecky's Hist. European Morals, i. 41, where it is added in a note: "This truth has been admirably illustrated by Mr. Herbert Spencer, Social Statics, pp. 1-8.") To the objection of Bentham and Austin that conscience varies as a standard with time and place, it is answered "that in every age virtue has consisted of the cultivation of the same feelings, though the standards of excellence attained have been different." That the elementary rules of conscience are constant, while in their practical operation they develop with civilization, is illustrated with much fulness by Lecky, *ut supra*, pp. 111 *et seq.* To same effect is Leslie Stephen's Science of Ethics, p. 434.

[2] *Infra*, § 106; *supra*, §§ 59–60.

ness, so we are repeatedly told by the courts, is to be sworn in the way by which his conscience is most bound: a Christian on the Bible; a Jew on the Old Testament; a Chinese or a Hindoo according to the rites he deems most sacred. A juror's conscience is appealed to to determine his competency; if conscientiously opposed to capital punishment, he is excluded from serving in a case in which a conviction might exact a sentence of death. A bill in equity "probes the conscience;" the whole distinctive basis, in fact, of equity, to which the common law when conflicting must now yield,[1] is conscientiousness; not, it is true, the conscientiousness of an isolated judge, but that which a series of enlightened judges hold to be the general standard of conscientiousness accepted by the community. That there is such a common conscience is over and over again asserted in those cases in which the courts refuse to aid in the enforcement of agreements which "shock the moral sense," or which are to effect "immoral" ends, or permit "unconscientious" advantages to be taken by one party over another. Agreements of guardian with ward, of party exercising influence with party subject to such influence, are set aside over and over again when "unconscientious," while otherwise they stand.[2] Marriages by our own citizens in a foreign land need not comply with the prescriptions of the place of solemnization when the parties cannot "conscientiously" accept such prescriptions; "conscientious belief" is in some cases admitted as a defence in prosecutions for libel, in other cases in prosecutious for perjury. The true basis, also, on which the law of blasphemy rests is the rights of conscience; a belief which one portion of the community conscientiously holds, other portions are not to be permitted publicly to insult. To strike out, therefore, from rulings of this class the terms "conscience" and "moral sense," would, apart from the objections hereafter to be noticed, resting on the inadequacy of the substitute, render inoperative a large part of our law. Nor could we accept utility as the sole standard for the enactment and application of law without subverting what the great preponderance of authority maintains to be the only

[1] *Infra*, § 113.

[2] See Wh. on Cont., §§ 159 *et seq.*

safe foundation of criminal law. Elsewhere I have appealed to such authority to show that the primary object of punishment is not utility, though utility is to be kept in view in adjusting the sentence, but right, without which no punishment can be useful.[1] If utility to the convict were the standard, there would be a large class of convicts, and those the worst, who could not be punished at all, since there is a large class of convicts who are beyond the limits of reformation. If utility to the community is the test, then the answer is threefold. In the first place, no punishment which is not right can be useful to the community, since the infliction of an unrighteous punishment would expose the government inflicting it to contempt if not revolt. In the second place, punishment inflicted not from settled rules of retributive right, but from an estimate of utility, assumes a despotic sovereign, imprisoning, banishing, or executing, not on strict proof of guilt, as is the case with the common law, but on grounds of expediency. In the third place, if the system of utility be logically carried out, punishment should precede, not follow, crime. It would be the duty of the sovereign to explore the characters of his subjects, and to immure or exterminate those who might be likely to do harm. Such a system, however, though it might be adapted to a paternal despotism, is irreconcilable with governments like those of England and the United States, in which punishment is proportioned to an offence to be duly proved in subordination to general principles of right.[2]

[1] See Wh. Cr. Law, 8th ed., chap. i.

[2] On this topic may be consulted Lecky's History of European Morals, where (i. p. 22, note), while speaking of Austin as the most philosophical and tolerant of the utilitarian school, he shows (i. pp. 13, 14) that, by the utilitarians, right or wrong is a mere matter of calculation. To this effect he cites Bentham's statement that "vice may be defined to be a miscalculation of chances, a mistake in estimating the value of pleasures and pains. It is a false moral arithmetic." Deontology, i. 131. By Hobbes, self-interest is made the sole test of right. See Treatise on Liberty and Necessity.

It should be observed that exponents of the ethical and utilitarian schools may apparently approximate. The utilitarian jurist may say that the expedient is always right, and that, therefore, pursuing expediency is always pursuing right. The ethical jurist may say that the right is always expedient, and that pursuing right is always pursuing expediency. We have this illustrated in the approximation of the two schools on the subject of punishment. The utilitarian

§ 97. It might be sufficient to rest here, and say that we cannot accept the substitution of "utility" for "moral sense," because this would conflict with some of the fundamental principles of our common law. It may, however, in view of the very fact that the common law, from its spontaneity and elasticity, adopts whatever modifications appear from time to time reasonable, be worth while to observe that "utility" is unsatisfactory as a standard from its indefiniteness. Conscientiousness, as the rulings of our courts show, may be reduced to a comparatively definite system, as it deals with comparatively constant elements. It is otherwise as to utility. Men do not differ materially as to what degree of immorality should vacate a bargain. But as to what is in the long run useful, there are not only leading schools irreconcilably hostile, but an infinite variety of eccentric individual peculiarities of opinion, which are stimulated by the fact that such matters are held to be not matters of principle, but matters indifferent as to which each person is entitled to form his own conclusions. We may illustrate this by reference to the important question of protective duties. Such duties are declared by Mr.

Utility not a satisfactory substitute from its indefiniteness.

often argues that punishment should be retributive, because a non-retributive punishment is not expedient. The ethical jurist often argues that punishment should be expedient, because an inexpedient punishment is not retributive. But on one essential point they differ: The utilitarian makes the standard of expediency external. It is physical comfort. He cannot introduce the test of satisfaction of conscience, since the existence of conscience he denies. But the ethical jurist makes the standard to consist in the satisfaction of conscience as well as physical comfort. And this is essential, since no amount of physical comfort can give happiness to a man whose conscience is not at peace. *Infra*, §§ 94 *et seq.*

Austin, it should be added, is very much in advance of Bentham on this topic. Bentham (Deontology, i. p. 142) tells us: "Weigh pains, weigh pleasures, and as the balance stands will stand the question of right and wrong." Austin, while denying equally with Bentham the existence of an actual moral sense, resorted to the doctrine of association to establish a substitute which, on utilitarian grounds, might to some extent answer the same purpose. We associate, for instance, pleasurable consequence with certain means—*e. g.*, just acts—therefore these means become prized by us, and gradually become ends. To this the answer is, (1) that a sense of right and wrong exists anterior to association; (2) if the result of calculation, then it is not a sense of right, but a sense of benefit to self.

Austin to be "absurd and mischievous;"[1] and he announces that the evasion of such duties can be practised "without the slightest shame." Some eminent publicists undoubtedly have held protective duties to be in the long run inexpedient; but it is impossible to deny the fact that both in Germany and the United States there are other eminent publicists who take the opposite position; and we must, therefore, conclude that it would be both distracting and pernicious to drag such topics within the range of the courts. The doctrine of *laissez faire*, also, although it may be wisely accepted as a general rule, has so many exceptions as to which there is and will continue to be irreconcilable diversity of opinion—*e. g.*, the restriction of sales of intoxicating drinks, and the prohibition of monopolies of necessaries—that to make utility in such cases the standard of judicial construction and adaptation, would not only greatly disturb the business community, but plunge the courts into discussions they have not the capacity to determine. There is, in other words, a fixed standard attainable for what is right; there is no such standard attainable for what is expedient. Even as to what is to be the end of the utility to be pursued, its most eminent teachers differ. By Mr. Bentham this was declared to be the greatest happiness of the greatest number; but happiness was treated by him as convertible with physical comfort. By Mr. J. S. Mill a higher model was assumed; and the happiness of self-sacrifice was constantly spoken of by him as superior to the happiness of self-enjoyment. By recent writers of one group, hedonism, in the epicurean sense, is spoken of as the goal; while another group makes the goal to consist in the eudaemonism of Aristotle; and another group in what is called "altruism," or the happiness of other people. We may well then join in asking, when the test of utility is proposed, "useful for what?" "So far from possessing the merit claimed for it of supplying the simplest of all tests of conduct, the utilitarian system furnishes no test at all, and has, consequently, to accept its test from some one of the systems which it repudiates."[2]

[1] Ibid., i. 202, Lect. V.

[2] Lorimer's Inst., 2d ed., 49. As to altruism, see Mr. Leslie Stephen's Science of Ethics (London, 1882, p. 239), and as to the "insoluble" controversy between "altruism"

§ 98. When utility is appealed to as a rule of action, another danger should be kept in mind. It contemplates the imposition of an arbitrary rule, based not on principle, but on personal conceptions of expediency; and the arbitrariness of such a decision is made all the more oppressive when utility is announced, as it is by Austin, to be the will of God. "If then," he says, "the principle of utility were the presiding principle of our conduct, our conduct would be determined by divine rules, or rather by moral sentiments associated with those rules."[1] "The religious duties of the subjects to the sovereign government," he further says, "are creatures of the divine law as known through the principle of utility;"[2] and again, we are told, "general utility is the index to the divine commands."[3] Whatever, therefore, the sovereign might impose as obligatory on the ground of utility would be obligatory *jure divino;* open to all the objections applicable to *jure divino* laws. But in truth, as we have seen, law partakes of the object to which it applies. When the object is constant, it imparts its constancy to the law: When the object is inconstant, it imparts its inconstancy to the law. Laws, therefore, which are not laws relating to the divine nature, do not emanate from the sovereign to the people

So from its arbitrariness.

and "egoism," see ibid. 248, 259; see, also, "Science and Morality," by Goldwin Smith, Contemporary Review, February, 1882, and answer by Herbert Spencer in same Review, March, 1882.

"Men may be arrayed against each other even to the shedding of blood," says Judge Hare, of Philadelphia, in an admirable address on the Ethics of Jurisprudence, delivered in Philadelphia in 1877, "without guilt on either side, and where both parties are actuated by a heroic sentiment of duty. *It was a fault of the intellect, and not the moral sense, that led the English cavalier to embrace the divine right of kings, and taught the secessionist to take up arms at the command of his state.*

"In the great majority of cases where men deduce opposite ethical conclusions from the same premises, *the difference is one of fact, not of principle;* some material circumstance is left out of view by one party or introduced supposititiously by the other, and varies the result. A court should lean to that application of the rule which will promote the ends of justice in the particular case, and may, when the circumstances require it, deduce a new principle, or declare the existence of an exception, or may give a custom which has become a part of the course of life or trade, the force of law, by making it the basis of a judgment or decree."

[1] Ibid., i. p. 122, Lecture II.

[2] Lect. VI., vol. i. p. 308.

[3] Lect. V., vol. i. p. 202.

accordance with the sovereign's *à priori* conceptions, and are not therefore immutable, but emanate from the people to the sovereign, fluctuating with the people's temper and wants.[1] Hence, in matters not relating to the divine nature, the ascription of *jure divino* authority to law is hostile at once to freedom of action and freedom of growth.[2]

So as ignoring national traditions.

§ 99. Another objection to the system of the analytical school is that in making sovereign power the source of law, and popular utility its object, it leaves out of account national traditions. Yet, as a matter of fact, it is on such traditions that the common law of every nation is in part based. The right to demand a writ of

[1] See *supra*, §§ 27, 86.

[2] The arrogance which is the usual concomitant of *jure divino* pretensions is illustrated in Austin's case by his treatment of Blackstone. No doubt Blackstone's optimistic admiration of the English law of his day is a fair matter of criticism; and no doubt no rational system of reform could be adopted without sweeping away the assumption of perfection and finality on which Blackstone's work is based. But this will not justify the expressions of scorn contained in such passages as the following: "Blackstone and others, probably misled by that conciseness and ambiguity (of the Roman law), have misapprehended grossly the true import of the division (law of things and law of persons), and have turned that elliptical and dubious language into arrant jargon." Lectures, etc., 4th ed., p. 43.

"The method observed by Blackstone in his far too celebrated Commentaries, is a slavish and blundering copy of the very imperfect method which Hale delineates roughly in his short and unfinished analysis." Ibid., p. 71.

"*Jus rerum* and *jus personarum;* phrases which have been translated so absurdly by Blackstone and others, *rights of persons* and *rights of things.*" Ibid., p. 374.

In p. 542, Blackstone is cited with what Mr. Campbell, Austin's last editor, calls "unusual respect," but this is explained by Mr. Campbell as "ironical."

In p. 556, Blackstone's theory that customary law exists as positive law by force of immemorial usage, a theory in which Blackstone is elsewhere shown to have been right—is declared to be "pregnant" with "numerous absurdities and inconsistencies."

"I will advert to a foolish remark of Sir William Blackstone concerning the judicial decretals of the Roman emperors," p. 654.

On p. 754, Blackstone is said to have run "into a signal confusion of ideas," which involved a series of "absurdities."

This is hardly the way in which a man so eminent as Blackstone should be treated, even by a critic who is able to make good the substance of his criticisms. But in the most conspicuous point excepted to by Austin, that of the authority of custom, Austin is wrong, and Blackstone right, while in respect to the general analysis of jurisprudence Blackstone's scheme has equal merit with that of Austin.

habeas corpus, for instance, may be temporarily suspended in England or in the United States on the assumption that such suspension is for the moment necessary; but the right to a writ of *habeas corpus* could not be permanently withheld either in England or the United States without a destruction of distinctive national existence. So the right of self-help in the way of self-defence and of the unofficial abatement of nuisances is so imbedded in nations of English descent that it could be obliterated in such nations neither by sovereign decree nor by proof no matter how urgent that redress should be obtained exclusively through officers of the law. The law of a nation, in fact, as is elsewhere shown,[1] is in part the necessary product of the past of the nation; and from this past it cannot be divorced.

So as to national genius.

§ 100. The scheme of the analytical jurists leaves out of account the distinctive genius of nations, which, in connection with their traditions, demands jurisprudences, which, however inconsistent with what may be called abstract utility, are most likely to suit their wants and promote particular national well-being. It may, for instance, appear proper to a utilitarian that the restraints of infancy should be rigidly imposed, if not its period extended. "No good," it may be argued, "can result from young men being prematurely plunged into business; business capacity should be withheld from them until the time arrives when they can manage their concerns in a way beneficial to themselves and the community." Now it may happen that this view may be the natural outgrowth of a thickly settled and torpid community with strong conservative traditions; and if so it may be there accepted as law. But this will not be the case if a legislature should seek to enforce it in a new country of whose active population a large part consists of young men who by the enforcement of such restrictions would be remanded to incapacity.[2] The law, it is true, might be passed; but even if not immediately repealed, it would be rendered

[1] *Infra*, § 111; *supra*, §§ 27 *et seq.*; 60.

[2] To such countries, at least, applies Lord Beaconsfield's saying, that the blundering of the young is more fertilizing than the caution of the old. See Whart, Conf. of Laws, §§ 113 *et seq.*

comparatively ineffective by the acceptance by the courts, as is the tendency in most new states of our own country, of the position that the contracts of an infant bind either when beneficially executed, or when permitted to remain after majority without repudiation. Or a utilitarian, convinced that early marriages tend to unduly swell population, may succeed in passing through a legislature a law placing serious obstacles on early marriages. Such a law might be respected and enforced in an over-populous Swiss canton. But though the settlers of one of our new territories came from countries where such laws were in force, though such laws should be adopted by the local legislature, it would be impossible to put them in operation in such new territory. Families would be founded in spite of the prohibition; there would be home after home started with father and mother who lived as husband and wife; the law, if we could conceive of such, which declared such unions invalid, would not be regarded as binding, and would soon be swept away.[1]

§ 101. Another defect in Mr. Austin's treatise is the imperfect exposition he gives of the law of negligence. According to his biography prefixed to the last edition of his lectures, "he often expressed his earnest desire to carry home, for the use of England, whatever were most worthy of imitation in Germany. He left Bonn in the spring of 1828, master of the German language, and of a number of the greatest works which it contains." To the lectures is also prefixed a list "of books on jurisprudence (chiefly of German authors) . . . which he chiefly valued and studied." It is remarkable that among these works is not included the treatise of Hasse on Culpa, published in 1815; a treatise which contemporary and subse-

Defective conceptions of negligence.

[1] As an instance of the reaction from the Austinian theory may be mentioned Mr. Lightwood's treatise on "The Nature of Positive Law," already noticed. (London, Macmillan & Co., 1883.) Mr. Lightwood maintains the unsatisfactoriness of the assumption that to the conception of law it is essential that it should be imposed by a sovereign with a sanction; it being argued by him that a sanction is not of the essence of law, but only an incident of it more or less marked. Mr. Lightwood concedes that law is the product of force; but he insists that this force must be held in check and moulded by the national sense of right.

uent German jurists have justly called "epoch-machende;" nd it is still more remarkable that in the many pages which Austin devotes to negligence (*culpa*), there is no reference nade either to Hasse or to the rules in respect to *culpa*, which, ince the publication of Hasse's book, have not been questioned n Germany. Those rules are as follows: *First*, the distinc- ion between negligence in commission and negligence in omis- ion is illusory. There is no negligent commission of wrong n the performance of a duty that is not an omission. There s no negligent omission of right in performance of a duty that s not a commission. *Secondly*, the distinction between *culpa ata* and *culpa levis* is that between the negligence of a non- pecialist and the negligence of a specialist. *Thirdly*, there is o liability for *culpa levissima*, or infinitesimal negligence. *Fourthly* (though this point is much more fully elaborated by ubsequent authors), there must be, to involve imputability, causal relation between the negligence and the injury. Now, not only is there no reference to these positions, which, hen Austin's lectures, delivered in 1832, were regarded on ll sides in Germany as established, but the subject of causal elationship is almost entirely unnoticed, while the distinctions aken as to negligence, when not actually erroneous, are crude nd inadequate. Thus negligence, on its criminal side, is efined as "criminal inattention, or inadvertence," which, as here is no explanation of what is meant by "inattention" r "inadvertence," is no definition at all; while the primary ivision given is that of negligence *non faciendo* and negligence *n faciendo*, a division, which, as we have seen, is not only ithout reason, but was repudiated as worthless by the domi- ant authorities of Germany at the time when Austin wrote. Negligence *non faciendo* is left by Austin without explanation; nd this is not unnatural, since any explanation would have hown that it was identical with negligence *in faciendo*, and herefore was not properly assigned to a co-ordinate rank with distinct title. Negligence *in faciendo* is divided into "heed- ssness," and "imprudence, which, when it is gross, is styled merity or rashness."[1] When, however, we turn back to a

[1] Op. cit., ii. 1094.

prior lecture to which reference is made,[1] to discover what is the difference between "heedlessness" and "negligence," we find that "the party who is negligent omits an act and breaks a *positive* duty," while "the party who is heedless *does* an act and breaks a *negative* duty." The minor division, therefore, is nothing more, illogical as this is, than a repetition of the major division of negligence *in faciendo* and negligence *non faciendo*, a distinction, which we have seen, is without either authority or reason. Aside from this, the words "heedlessness," "imprudence," "temerity," and "rashness,"[2] are in common life used so often interchangeably as to unfit them for the technical purposes to which they are here applied; and that this is the case is illustrated by the fact that notwithstanding the enthusiasm excited by Austin in the school that has adopted his philosophy, the words have never taken root in English legal literature, and the distinctions and definitions thus expressed are not even referred to in subsequently reported arguments and adjudications. Still more strikingly may this criticism be applied to Austin's definition of causal relation. "Negligence, or criminal inattention," he tells us,[3] "may be divided into *proximate* and *remote; proximate*, where it accompanies (or is the immediate cause of) the criminal omission or act; *remote*, where it has caused an inability, on the part of the criminal, to do or forbear as he ought." If this does not mean that there is no imputation in cases of "remote" negligence, then the distinction is unnecessary. If it does so mean, then

[1] Op. cit., i. 440, 444, 474.

[2] Lest I should have unconsciously misinterpreted Austin in this respect, I give entire his titular analysis:—

"Negligence (or criminal inattention or inadvertence)

Negligence *non faciendo*	Negligence *in faciendo*
Negligence or Heedlessness.	Imprudence; which, when it is gross, is styled Temerity, or Rashness.

[3] Op. cit., ii. 1094. —Op. cit., ii. 1094.

the distinction is misleading. A negligence which "caused an inability on the part of the criminal to do or forbear as he ought" (*e. g.*, a negligence on the part of a switch-tender, which "causes his inability" to duly care for the switch), imposes upon him, if injury ensue, criminal liability as much as would any other kind of negligence causing the same result. The true definition of negligence is that it is an offence which ensues from a defective discharge of a legal duty, which defect could have been avoided by the exercise, by the offender, of that care which is used, under similar circumstances, with prudent persons of the same class.[1] And in law a cause is such action of a responsible person as turns the balance of forces previously in equilibrium.[2]

Austin's merits as a law reformer.

§ 102. Yet, after making due allowance for the defects which have been just stated, it is impossible not to recognize the immense value to jurisprudence of Austin's services. It was by Austin that the aid of foreign cultivation and, as we will presently see, of mystic enthusiasm was given to Bentham's propagandism. Bentham's political radicalism and his scorn for contemporary thought, taken in connection with his grotesque terminology, had greatly narrowed the field of his influence. Austin, on the other hand, though his style was cloudy and tortuous, wrote with a grave earnestness not unsuited to win enthusiastic disciples; and he possessed what Bentham did not possess, considerable knowledge of German legal literature of his day. Such resources, and such particular caste of intellect, taken in connection with Bentham's marvellous sagacity of criticism and vividness of expression, contributed not only powerful weapons of destruction, but pregnant suggestions for reconstruction. And to this work Austin added valuable aid in two important relations. He showed what, according to the Roman law, was the distinction between possession and property. In exhibiting the unreasonableness of assigning law and equity to distinct tribunals he

[1] Whart. on Neg., chap. i.; Whart. Crim. Law, 8th ed., § 127.

[2] Whart. Crim. Law, 8th ed., §§ 15 *et seq.*

foreshadowed recent legislation by which equitable doctrines are made supreme even in common law courts.

§ 103. Another merit of Austin is to be found in the discriminative ability of his vindication of what he calls "judiciary law;" and this is the more worthy of notice since "judiciary law," *i. e.*, the law expounded and developed by judges, was, under the title of "judge-made law," treated with peculiar contempt by Bentham, and, under the title of "judicial legislation," was censured by even so high a forensic authority as Sir Samuel Romilly. It is true that a good deal of Austin's vindication of this form of law is traceable to his unique assumption that customs are not law until pronounced to be law by the courts. But even striking out the whole of his argument based on this assumption, he has shown that "judiciary law" is a necessity of all systems in which the application of law to litigated cases is given to a judiciary. He refutes Bentham's objection that "decisions" are not "commands," and are not therefore "laws," by showing that they are commands if made so by the constitution of the state. To Romilly's objection that this makes subordinate officers of the crown autocratic, and that the appointment of judges may be open to sinister influence, he replies that the same objection applies to the legislature, and that even were it not so, the objection is not "to judicial legislation, but to the manner in which the judges are appointed." "If their appointment by the crown," he goes on to say, "render them obnoxious to its influence, and if their obnoxiousness to the influence of the crown produce judicial legislation adverse to the general interests, let their appointment be vested in some party or another whose interests do not conflict with the community at large." To the objection that "judicial legislators legislate arbitrarily," he replies that judicial action is "controlled by public opinion," and "by the sovereign legislature, under whose inspection their decisions are made; by whose authority their decisions may be revised, and by whom their misconduct may be punished."[1] The same objection, he adds, is applicable to statute law; and

Merit of Austin in vindicating "judiciary law."

[1] Op. cit., ii. 666.

he remarks with great justice that arbitrariousness on the part of the bench is held in check by the independence and ability of the bar. An undue tendency to introduce new rules, he further argues, is prevented by the following causes:—

"1. A regard for the interests and expectations which have grown up under established rules, or under consequences and analogies deducible from them.

"2. A perception of consequence and analogy, which determines the understanding, independently of any other consideration."

It is, he holds, an objection to judiciary law that to reach it in an elementary shape is often "a delicate and difficult process," and that it is a process "commonly performed in haste." The last part of the objection, however, he insists, does not apply to all judiciary law, and the first part, it may be added, is as applicable to legislative attempts to establish new distinctions as it is to judicial attempts in the same direction. That "judicial legislation" is, as to new cases, *ex post facto*,[1] he admits, but this he seems to look upon as a necessary evil, which is in some degree relieved by the fact that such decisions are more or less anticipated by the bar if not by the community. That the decisions of the courts are dispersed, bulky, and difficult to collect, and are attested by the "disputable records of private reporters," is also conceded to be an evil; as is also the want of comprehensiveness, of fixity, and of system attending these decisions. These defects, however, he holds could be in part remedied by statute, and are in part inherent in all laws. In any view, while a well-expressed code is, he holds, the best of all ways of setting forth the law, judicial decisions, he maintains, are better than badly expressed statutes. To this it might be added, that even a well-expressed code would not preclude what Austin calls "judicial legislation."[2] All language, no matter how carefully chosen, is subject to ambiguities, either patent or latent, that is to say, either in itself or in the objects to which it applies. The points of differentiation will multiply with the fineness of the distinctions taken, and every new point settled will present

[1] See *supra*, § 32.

[2] See *supra*, §§ 30 *et seq.*; *infra*, § 114.

an indefinite number of new points for settlement. No matter, therefore, how exact and minute might be a code, "judicial legislation" would still be a necessity of litigation.

§ 104. Bentham and Austin, though both utilitarians, and bearing in some respects the relations of master and disciple, belonged to essentially different schools of thought. Bentham was logical; Austin mystical. Bentham dealt in vivid characterizations, in scornful or ludicrous exposures, in keen analysis; and he wielded with unrivalled force what logicians call destructive conditional syllogisms. Austin was in the main a rhetorician, and, as is the case with all other rhetoricians, occasional vagueness was with him by no means inconsistent with luminousness. Bentham's cynical logic exposed the abuses he assailed to contempt which was shared by almost all by whom this logic was impartially considered. Austin's mystical fervor aroused among the few who came under his influence an enthusiasm for utilitarianism, which in itself it is not calculated to inspire. Bentham, as a cynic, treated utilitarianism as a calculation of selfish policy; Austin, as a prophet, treated it as the voice of God. Bentham had but little knowledge of Roman and none of German law; Austin, as we have seen, was a diligent student of both the Roman and German systems, though without the peculiar power needed to reproduce either in exactness. Rationalism in other departments of thought has the same schools; and while Bentham has been likened to Paley, as representing rationalism on its logical side, Austin may be likened to Maurice, as representing rationalism on its mystical side. There is much of the luminous nebulosity, as it has been called, of Maurice that may be noticed in Austin; there is the same capacity in Austin of awakening enthusiasm in a limited school of eminent disciples which was so conspicuous in Maurice. But the work done by Austin can only be regarded as auxiliary to that done by Bentham. Bentham's logic, grotesque and elliptical as it was, indicated, when destroying, a substitute. If a follower of Paley, so far as concerns the appeal to common sense, he was the leader of Carlyle in the art of putting this appeal in terms which sometimes in their very humorous eccentricity convey arguments in a flash.

Mystic and logical schools of utilitarians.

In this way he has stimulated innumerable practical reforms.[1] Austin, on the other hand, stimulates rather to deep thought than to exact expression; and while he has undoubtedly given a great impulse to the study of law as a philosophy, he has done little to mark its exact boundaries as a science, or to improve the framing of statutes as an art.

Distinctive views of Holland.

§ 105. Professor Holland, in the thoughtful work published by him, on the "Elements of Jurisprudence,"[2] takes an intermediate position. He recognizes the fact that Austin is in error in ascribing the authority of customs to their recognition by the courts, and in refusing to regard such recognition as retrospective in its effect. He holds, however, with Austin, "that usage, though it may make rules, cannot, without obtaining for them the recognition of the state, make laws,"[3] which, as we have seen, is by no means always the ease;[4] and, in harmony with Austin, he defines law to be a general rule of external action enforced by a sovereign political authority. To this, however, it may be justly objected that in many instances, *e. g.*, in the formation of our American colonies, there were laws in abundance which the "sovereign political authority" did not adopt,[5] and that there are now at least in Europe many laws which the "sovereign political authority" either cannot or will not enforce.[6]

Of Herbert Spencer.

§ 106. According to Herbert Spencer the law of the present has been gradually "evolved" from the past. It is, indeed, much impressed by the mould of the present. Its current, however, is transmitted; though the application to which it is put, and the aspect under which it is presented, may be the product of immediate forces. "When a political agency" (and under this head falls law) has been "evolved, its power, largely dependent on present public opinion, is otherwise almost wholly dependent on past opinion. The ruler, in part the organ of the wills of those around, is in a still greater degree the organ of the wills of those who

[1] It is not only in style that Bentham and Carlyle are alike. They both made sovereign force at once the originator and the enforcer of law.

[2] London, 1882.

[3] P. 48.

[4] *Supra*, §§ 2, 26.

[5] *Supra*, §§ 23 *et seq.*

[6] See Mr. F. Pollock's Essays, etc. 1882.

ve passed away; and his own will, much restrained by the
st, is still restrained by the last. For his function as regu-
or is mainly that of enforcing the inherited rules of conduct
ich embody ancestral sentiment."[1] "Instance the fact that
r own common law is 'mainly an embodiment of the cus-
ms of the realm,' which have gradually become established;
older part, nowhere existing in the shape of enactment, is
be learnt only from text-books; and even parts, such as
ercantile law, elaborated in modern times, are known only
rough reported judgments, given in conformity with usages
oved to have been previously followed. Instance again the
ct, no less significant, that at the present time custom perpet-
ally reappears as a living supplementary factor; for it is only
ter judges' decisions have established precedents, which plead-
s afterwards quote, that the application of an act of parlia-
ent becomes settled. *So, that while in the course of civilization
ritten law tends to replace traditional usage, the replacement never
comes complete.*"[2] "How persistent is this authority of the
nctified past over the not-yet-sanctified present we see among
rselves, in the fact that every legislator has to bind himself
/ oath to maintain certain political arrangements which our
ncestors thought good for us.—While the unchangeableness
' law, due to its supposed sacred origin, greatly conduces to
cial order during those early stages in which strong re-
raints are most needed, there, of course, results an unadapta-
veness which impedes progress when there arise new con-
tions to be met. Hence come into use those 'legal fictions'
/ the aid of which nominal obedience is reconciled with
tual disobedience. Alike in Roman and in English law, as is
inted out by Sir Henry Maine, legal fictions have been the
eans of modifying statutes which were transmitted as im-
utable, and so fitting them to new requirements; thus
niting stability with that plasticity which allows of gradual
ansformation."[3] In originating and moulding law con-
ience is a principal factor; and conscience is a function,
hich, whatever may be its origin, is transmitted from gene-

[1] Sociology (Appleton's ed. of 1883), § 468. See Hooker to this effect, *supra*, § 86.

[2] Ibid. § 529.

[3] Ibid. § 531.

ration to generation, growing in delicacy and equity the progress of civilization, though more or less conditi at each epoch by its environments.[1] Whether Mr. Spen familiar with the works on the origin of law published b German historical school of which Savigny was the leader not appear; but with the views of that school those of Spencer coincide on the main questions at issue. (1) Lav cording to both Spencer and Savigny, as the product of cu is in the main the product of the past, the past in this dominating the present and moulding the future, thougl current is tinged, swerved, swollen sometimes, and somet diminished, by its environments. (2) There can be no final fication of law, since law is, from the necessities of the ca a constant process of change and growth. What it is tc is necessarily different from what it was yesterday. Wh will be to-morrow will be necessarily different from what to-day. It can no more be arrested and fixed in its pr state than can the life of any human being be arrested fixed in its present state. When growth and modifica are arrested comes death.—Such are the points of agree between Mr. Spencer and the leaders of the historical sc The points of difference are as follows: (1) By the histo school the power of the past is attributed not to a po belief in its "sacredness," or supposed supernatural sanctio is maintained by Mr. Spencer, but in part to habit, in pa affection for nation and country with which the laws in tion are associated, in part to hereditary tendency, in pa this being the most potent factor—to a conscientious b that vested rights and social and political customs are a tage which it is the duty of all to maintain. (2) By the torical school, conscience, if so we can translate the *Volks* of Savigny, is the dominant factor in evolution; while Mr. Spencer, conscience, at least in part, is evolved by under specific environments, and is not a primary factor in lution. Yet, even here, the difference may be more non than real. By the historical school conscience is verifie reason, is interpreted by reason, is applied by reason;

[1] Principles of Morality, Appleton's ed., 1883.

by that school the modification of national conscience by national environments is strenuously maintained. Waiving the question, of the origin of conscience, Mr. Spencer's view, therefore, in this respect, does not differ materially from that of Savigny. On the other hand, Mr. Spencer differs from the analytical school in assigning to conscience any proper function in law-making. According to the analytical school, expediency, or, in other words, a sense of utility, becomes more and more potent as the instigator of laws as civilization advances. According to Mr. Spencer, conscience, descending not only in increased volume, but in increased delicacy and comprehensiveness from father to son, as civilization advances, assumes in such an advance a more and more commanding attitude. In fact, in this respect, the views of Mr. Spencer approach the common terrace on which rest the views of Butler and Kant. As to the origin of conscience he may apparently differ from Butler. Yet, even here, the difference is not that of absolute contradictory opposition.[1] Mr. Spencer does not deny the original germinal planting of conscience by the hand of God; this is a region to which he does not penetrate. On the other hand, Butler, so far from denying the growth of conscience with the growth of civilization, and the modification of conscience by its environments, expressly affirms such growth and modification. On the main points, therefore, in which the historical and the ethical schools unite in their opposition to the analytical school, Mr. Spencer's authority is with the historical and ethical schools as against the analytical. And he has advocated the main contention of the historical school —that of the evolution of law from the past and its inevitable and necessary evolution in the future—with a wealth of illustration and subtlety of differentiation such as no other English writer on this topic has equalled.

§ 107. It remains to notice the principal reforms in English law adopted under the impulses above stated.

Reforms recently adopted in England.

(1) *Equity.*—By the judicature act of 1873, the court of chancery has ceased to exist as an independent tribunal, and its functions as a court of justice have been transferred to (1) the high court of justice, and (2) the court of appeal.

[1] *Supra*, § 60.

The consequence is, as will be presently seen more fully,[1] that equity is now blended with law, and that as the common law courts apply equity doctrines, there is no longer any reason for equity courts to interfere with the action of courts at common law. Every judge of the supreme court of judicature is now bound to recognize and give effect to all equitable rights and liabilities appearing incidentally in the course of any procedure.[2]

(2) *Evidence.*—Evidence in chancery proceedings is now by oral examination, as is that in courts of common law, except where otherwise agreed by the parties or ordered by the court.

The disqualification from interest is removed, and parties in civil issues may be examined. And the disqualification from infamy is also now removed.

(3) *Pleading.*—By the rules of the judicature act the old system of pleading is swept away, and instead of a declaration the plaintiff is required to deliver to the defendant a statement of complaint, to which the defendant is required to file an answer, set-off, or counter-claim, as the case may be. The plaintiff then may hand back his reply. "Every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs, numbered consecutively, and each paragraph containing as nearly as may be a separate allegation." Further provisions are made by which the shaping of the issue so as to present the actual facts in litigation is directed. Pleading, therefore, under the new system consists of statements delivered alternatively by the parties to one another until the questions of fact or law at issue are ascertained.

(4) *Process* is greatly simplified; and imprisonment for debt in matters merely contractual is abolished.

(5) *Married Women.*—By the married women's property act of 1882 (45 and 46 Vict., c. 75), a married woman is made capable of holding or disposing of any real or personal estate as her separate property, and of making contracts as if she

[1] *Infra*, § 113.

[2] See Hayne's Outline of Equity; Snell's Principles of Equity; Trower's Prevalence of Equity; see, also, *supra* § 35; *infra*, § 113.

were a feme sole. A woman married after the passage of the act "shall be entitled to have and to hold as her separate property, and to dispose of all real and personal property which shall belong to her at the time of marriage, or shall devolve upon her after marriage," etc. These provisions, as is said by an eminent judge, convert a married woman, so far as business is concerned, into a "spinster."

(6) *Settled Estates.*—Prior to 1856, settled estates could not be sold or leased except under the authority of the settlement or that of an act of parliament. In 1856, by the settled estates act (19 and 20 Vict.), as amended in 1877 by the act of 40 and 41 Vict., the court of chancery is invested with large powers to direct sales and leases, and enable tenants for life to make certain leases which bind the remainder. By the settled land act of 1882 (45 and 46 Vict.), tenants for life are liberated from the control of their trustees and enabled, under certain restrictions, to improve the settled land and to sell it, the proceeds to be invested for the benefit of the parties interested in modes specified by the statute.

(7) *Estates Tail* may be barred by the tenant in tail, under the 3 and 4 Wm. IV., under certain limitations, by an ordinary deed used in the conveyance of fee-simple estates. All that an estate tail can now do is to keep an estate in a family for two generations. On the marriage of the owner of an estate, for instance, it may be settled on him for life, with remainder in tail to the oldest son of the marriage; when a son is born he is tenant in tail, subject to his father's life estate; and when he reaches twenty-one, he is able, with his father's assent (the father being constituted "protector" under the statute), to bar the entail. This consent, however, may be given on condition of a resettlement on the son for life, remainder to his issue in tail.

(8) *Criminal Law.*—Capital punishment, since the act of 24 and 25 Vict., cc. 96–100, can now only be inflicted in cases of high treason and murder.

§ 108. Of living American writers on law it would be out of place now to speak. A work of this class, however, would be imperfect which omitted to pay tribute to three eminent jurists by whom the legal literature

Story.

of the country has been invested with cosmopolitan distin
tion.—Joseph Story was born in Marblehead, Massachusett
in 1779. He graduated at Harvard College in 1798, and wa
admitted to the bar in 1801. In 1808 he was elected t
congress as a democrat of the school of Mr. Jefferson, the
president, taking in the canvass decided ground in support o
the administration against what was then regarded by hi
as the disintegrating policy of the federalists. In 1811 he wa
appointed by Mr. Madison a judge of the Supreme Court o
the United States, which post, together with that of profess
in the law school of Harvard College, he continued to fi
until his death in 1845. His works are numerous, and all o
high value. That which achieved for him the greatest Eur
pean reputation is his treatise on the Conflict of Laws. H
published, in addition, Commentaries on Bailments, on Equit
on Agency, on Partnership, on Bills, on Notes, on the Co
stitution, and on Equity Pleading. What, on examining h
works superficially, first strikes us is the prodigious industr
they exhibit. Such a mass of literature, in which the sty
throughout is felicitous, the positions taken in the main ju
and accurate, and the references exhaustive, would be as muc
as men of ordinary parts could produce, even if a lifetime wer
given to the work. These, however, were issued at the ra
of almost a volume a year while he was attending with co
scientious devotion and consummate ability to his duties a
judge and as professor. But there was something more tha
industry exhibited in the preparation of these remarkab
volumes. Judge Story was undoubtedly, in one sense, a pa
tisan. He was, as has been stated, a democrat in his earl
career; in after days, when on the bench, he fell into enti
sympathy with Chief Justice Marshall, whose attachment to th
federal party, in its national phase, remained unshaken, an
whose political tendencies were always opposed to the distin
tively democratic school, as represented by Jefferson and Jacl
son. But Judge Story was never a mere partisan; and th
key to his political views was his nationalism—nationalis
as opposed, first, to what he regarded as the separatist tende
cies of the extreme federalists, and afterwards to what he r
garded as the undue particularistic and disorganizing tendenci

of the extreme democrats. A strong and glorious national government was always before him as the object to be struggled for, no matter from whom the antagonism might proceed; and it is by this spirit that his Commentaries on the Constitution, and his opinions on constitutional law are pervaded. Analogous to this is the temper which qualifies his discussions of matters not distinctively political. He had studied technical law thoroughly; without such study no one could have written treatises such as those produced by him on equity, or have listened, with attention clear and curious, to the arguments of some of the ablest technical as well as philosophical lawyers whom the country has produced; or have written so many masterly opinions on questions of technical law. But with all this he did not delight, as some eminent judges and jurists have done, in deciding questions on grounds merely technical. He had a generous ardor for reaching at once the justice and the philosophy of the case; and if he was disposed to bend the particular merits of a case to a general principle, it was a principle not of artificial and local law, but of law that was philosophical and catholic. *Boni judicis est ampliare jurisdictionem* is a maxim which was undoubtedly illustrated in his judicial history; yet there was nothing petty or personal, as has been the case with some distinguished judges, in this ambition, but it sprang, in his case, from a glowing conception of the splendor and benignity of law when wisely developed and universally applied, and a noble impulse on his own part to contribute not only to the wisdom of its development, but to the universality of its application. Some of his decisions extending the jurisdiction of the Federal courts were afterwards modified; his ideal of equity supervising in all matter the action of courts of law, is now giving way to the better system of courts of common law adopting for their government the principles of equity; the positions taken by him in respect to the perpetual inviolability of business charters have been since shown to be incompatible with the due growth of a country of such marvellous opulence and variety of resources as the United States; his tendency to expand the power of the general government and restrict those of the states, may conflict with the recent tendency of the Federal supreme court

to maintain intact the rights of the states when menaced by encroachments from congressional majorities; but to his splendid intellectual gifts, to his magnanimity, and to his love of justice, lawyers and students will do reverence as long as the English language endures. He had, what Blackstone had not, earnestness in the vindication of what he thought right and great as distinguished from dexterity in the defence of what at the time exists; and if we miss in his pages that humor which Blackstone occasionally shows, and which, perhaps, was an essential element in the defence which Blackstone undertook of institutions which were in themselves absurd, he exhibits equal happiness of expression with far greater enthusiasm for his work, and a far higher conception of the office and capabilities of law. His erudition was, for his day, immense. He did not understand German, and hence there are no references in his pages to those great German masters, who have exhibited the philosophy as well as the history of the law, with a fulness not known in any other tongue. With the *corpus juris*, in its now revised text, as supplemented by the treatise of Gaius, he had necessarily no acquaintance; and, though sometimes he cites Pothier, yet his main reliance, especially in his works on Bailment and on Conflict of Laws, was on the scholastic jurists of the *renaissance*. From the pages produced by those wonderful intellects, he drew largely, and to this may be attributed not merely the logical subtlety but sometimes the scholastic speculativeness of some of their distinctions which he reproduces. For, while the classical jurists of imperial Rome wrote for a business world, which in its vastness and complexity was not unlike our own, the scholastic jurists wrote for an unreal system in which business, in a large sense, had not yet been revived. We might, perhaps, imagine the delight with which Judge Story, singularly gifted as he was with the capacity of applying liberal and generous principles to concrete cases as they arose, would have seized upon the pages of Savigny, or even of Windscheid and of Ihering, and with which he would have greeted the unconscious and undesigned approximation, as it is exhibited at present, of two jurisprudences which in his day stood apparently so far apart, as did the English law as taught by Black-

stone, and the Roman law as taught by the Voets, by Bartolus, and by Baldus Ubaldus. But this was denied him; and while his pages reproduce the scholastic jurisprudence on the points he discusses, they do not fully exhibit the classical Roman law, and they are silent as to the jurisprudence of Germany, at that time starting into luxuriant life. Yet, notwithstanding this defect, his works, unlike other professional treatises, continue to be read as freely, and relied on as constantly as when they were first published. And the reason is to be found not merely in their erudition, not merely in the flow of their attractive style, but in the manly and liberal justice by which they are pervaded. They state with general accuracy the law of the past and the law of the then present. But while they do this there is an instinctive moulding of all past and present rulings to a kindly, generous, and catholic sense of right. He is not, as was Blackstone, simply a skilful apologist for the law as it exists. The law that exists he narrates, but the law as it should be, he unfolds.

§ 109. James Kent, author of the Commentaries which bear his name, was born in Dutchess County, New York, in 1763. He graduated at Yale College in 1781, and began the practice of law in 1785. He was elected to the legislature in 1790, adhering to the Hamiltonian wing of the federal party; and though remaining attached through life to that party, following the Hamiltonian policy, and showing no sympathy, either in his public action or his writings, with that section of the federalists which sought to embarrass the government in the war of 1812, and which desired, more or less earnestly, a dissolution of the Union. He became professor of law in Columbia College in 1793, and in 1797 was appointed judge of the supreme court of the state. In 1814 he was made chancellor, the revised statutes, in whose preparation he took considerable part, giving to the chancellor a jurisdiction analogous to that of the lord chancellor in England. By the then constitution of New York judges ceased to hold office when reaching the age of sixty; and this law deprived the state of the services of Chancellor Kent in 1823. He resumed his position as professor of law at Columbia College, and subsequently sent his lectures, delivered in this capacity, to the Kent.

press, under the title of Commentaries on American Law. To this work, which has run through twelve editions, with a circulation greater than that of any other American law book, his reputation is mainly due. It has not the eloquence which marks some of his judicial opinions, nor the freedom from digression and evenness of treatment by which Blackstone is distinguished, nor the enthusiasm and *predictiveness* which, in matters of conflict or matters as yet unadjudicated, give to the pages of Story such peculiar authority. But the style is perspicuous and scholarly, and the law that obtained at the time in this country is exhibited with fulness and simplicity.

Wheaton.

§ 110. Henry Wheaton, whose work on International Law has been translated into almost every modern language, was born in Providence, Rhode Island, in 1785. He was partially educated in France, with whose language and literature he became familiar, and then practised law in Providence and in New York. Becoming reporter of the Supreme Court of the United States in 1816, he published a series of reports which, for their accuracy and elegance of style in the parts contributed by himself, as well as for the high value of the opinions contained in them, will rank among the best reports in the English language. In 1827 he was sent as chargé to Copenhagen, in 1836 as minister plenipotentiary to Berlin. He died in 1848, when about to enter on his duties as professor of international law at Harvard College. Few writers have had talents and opportunities so fitted for a particular work as had Mr. Wheaton for the treatise on international law with which his name is associated; and among the works on that topic, though it has many successors, both in England, in France, and in Germany, it still retains the first rank. His style is simple and compact; his method perspicuous; his judgment almost unerring. The whole literature of the subject as it existed when he wrote he mastered; and he has had the rare distinction of supplying in his book the base on which subsequent literature has rested. In this country the fate of the book has been singular. It was republished during the late civil war, with notes of extraordinary fulness and richness, by the late Mr. William Beach Lawrence, himself not inexperienced as a diplomatist, and pos-

sessed of a knowledge of international law surpassed by no contemporary. Another edition was shortly afterwards published by the late Mr. Richard H. Dana, who added many interesting notes. Mr. Wheaton, in his lifetime, had been obliged, as he supposed, to have recourse to law to vindicate his right to his own share in the work of his reports:[1] Mr. Lawrence took the same course in reference to a supposed invasion of his rights by Mr. Dana's edition of Mr. Wheaton's work. The result was the temporary locking up under an injunction of Mr. Dana's edition, and the exhaustion without republication of the edition by Mr. Lawrence. Subsequently Mr. Lawrence published in French his "Commentaire sur les Elémens du droit international et sur l'histoire du progrès du droit des gens de Henry Wheaton," of which the fourth volume appeared in 1880, but which was never finished.

In this country the English colonies received the common law as far as adapted to their particular conditions.

§ 111. The mode has been already stated by which the people of the English colonies in this country modified the common law they brought with them so as to adapt it to their distinctive needs and to their distinctive genius; and it has been further shown that the common law came to us, not by conquest or colonization, but by adoption.[2] The process of discharging from the law that which was superfluous or inapplicable was, as we have seen, instinctive, and in a large degree unconscious.[3] It was the same process as that by which, in England, laws have become obsolete, with the important distinction that in England it requires the non-use or non-recognition of a law for several generations to extinguish it, while English laws which were inapplicable to the colonists of this country were extinguished by the very fact of emigration. There was, as we have seen, and as will be noticed again in the next section, no sanction of any material revision by the British crown and parliament, whose supremacy the colonists united in acknowledging, of the law of England as bearing on her American colonies The work of winnowing the law of the colonies[4] was, therefore, as instinc-

[1] Wheaton *v.* Peters, 8 Pet. 591.
[2] *Supra*, §§ 22 *et seq.*, 90.
[3] *Supra*, §§ 62, 90.
[4] *Supra*, §§ 21, 27.

tive and spontaneous and unmarked by agitation, or *à pri[redacted]ri* legislation, as was the work of family growth in the co[redacted]lo-nies; and as the colonies took their type from the particul[redacted]ar population by which they were settled, so it was more or [redacted]less with the process of modification of the common law whi[redacted]ch the colonists brought with them. But this law was not i[redacted]m-planted by conquest, nor by colonization, but, as we have see[redacted]n, by the spontaneous action of the colonists themselves.[1]

Recent English reforms anticipated in the United States.

§ 112. Before the Revolution, the principal modification of the English system of law effected by the colonists was by the silent method of consuetudinal adaptation and reduction. Attempts at modification by colonial legislation were not often made, or when made, were, if the changes were material, not often successful. "For the most trifling reasons," says Mr. Jefferson, in his "Summary of the Rights of British America," published in 1774, "and sometimes for no conceivable reasons at all, his majesty has rejected laws of the most salutary tendency." "The abolition of domestic slavery is the great object of desire in those colonies, where it was unhappily introduced in their infant state. But previous to the enfranchisement of the slaves we have, it is necessary to exclude all further importations from Africa. Yet our repeated efforts to effect this, by prohibitions, and by imposing duties which might amount to a prohibition, have been hitherto defeated by his majesty's negative." . . . "With equal inattention to the necessities of his people here, has his majesty permitted our laws to be neglected in England for years, neither confirming them by his assent, nor annulling them by his negative; so that such of them as have no suspending clause, we hold on the most precarious of tenures, his majesty's will. . . . And, to render this grievance still more oppressive, his majesty, by his instructions, has laid his governors under such restrictions, that they can pass no law of any moment, unless it has such suspending clause; so that however immediate may be the call for legislative interposition, the law cannot be executed

[1] *Supra*, § 90.

[2] On this point see remarks of Burke, cited *supra*, § 64, and of Barré, cited Webster's Works, 287.

it has twice crossed the Atlantic, by which time the evil have spent its whole force." Yet, while the work of al legislation was thus, for a century, paralyzed, the peo- is has been shown in prior sections, were silently evolving tomary jurisprudence of their own; and when, after the lution, independent legislatures were established, this prudence received formal legislative sanction. Long, fore, before even the days of Bentham, imprisonment for was here virtually abolished, restraints on alienation of estate were removed, real estate was made a fund for the ient of debts, primogeniture was abrogated, and the ex- es of litigation were greatly reduced, while by statutes iding for the recording of deeds the transfer of real estate greatly simplified. It is true that the old forms of plead- were retained much longer, and that the common law re- tions on the competency of witnesses were not removed me of our states until after their removal in England. in other respects, either by legislation, which was virtually ratory,[1] or by changes accepted unconsciously by the le and then ratified as existing and binding customs by courts,[2] a system of law has been adopted throughout the ted States which in its leading features has anticipated main recent English reforms.[3]

113. The recent English rule, embodied in the judicature of the "prevalence of equity" was anticipated, much from necessity as from choice, in Pennsyl- ia before the Revolution. In that province, as have seen,[4] attempts were made to adopt a court chancery through whose agency the English distinction ween law and equity could be preserved. These attempts, vever, did not succeed, and the courts were left to the rnative of refusing equitable relief *in toto*, or granting it er common law forms. The latter course was adopted by modifications of the law which were first ventured in tice, then became a sort of customary law, and then were tioned by the courts as constituting part of a system

And so of "prevalence of equity."

[1] *Supra*, § 27.
[2] *Supra*, § 22.
[3] *Supra*, § 90.
[4] *Supra*, § 24. As to evolution of equity, see *supra*, § 33.

which was already established. (1) The equitable capacity the action for money had and received, already foreshadow by Lord Mansfield, was enlarged, so that in this and kindred forms of assumpsit all equitable claims for the p ment of liquidated debts could be made good. (2) By action of ejectment, equitable liens could be enforced. Suits for damages to be released on performance of a spec act were made to serve in the place of bills for specific p formance. (4) Instead of resorting to the circuitous a expensive process of rectifying a document by application a court of chancery, parol evidence was held admissible, in suit on the document, to prove what it really was. (5) Eq table grounds for staying an action, which in England cou only be made available by a bill for an injunction, were he admissible for the defence under the general issue with noti This, which is the system to which English legislation is nc ripening, was supplemented in Pennsylvania by special statut investing the common law courts with the power of granti bills of discovery, bills for specific performance in matters which common law remedies could not be applied, bills for p tition, bills for injunction, bills for accounts, bills of interplead and bills of peace. From the earliest period of the commc wealth of which we have law reports, the doctrine that, in ca of conflict, equity is to prevail over law, equity being in this w recognized as part of the common law, was established in Pen sylvania;[1] and what were in England special chancery writs (*e.* bills for injunctions and discovery) were, under statutory powe issued by the common law judges in Pennsylvania long bef these powers were committed to the common law judges England.—As following in the same line with Pennsylvani though without, as a rule, applying so largely equitable d trines through common law forms, may be enumerated the stat of Maine, New Hampshire, Massachusetts, Rhode Island, Co necticut, Virginia, West Virginia, North Carolina (in whi state, though there is no distinct chancery court, the line

[1] Pollard *v.* Shaaffer, 1 Dall. 210; see other cases cited in Bright. Per Funk *v.* Voneida, 11 S. & R. 169; Dig., tit. "Equity." Church *v.* Ruland, 64 Penn. St. 432;

demarcation follows that formerly obtaining in England), Georgia, Illinois, Texas, Florida, Michigan, Iowa, Arkansas, and Oregon.[1] In New Jersey, Maryland, Kentucky, Delaware, Tennessee, Mississippi, and Alabama distinct courts of chancery are still retained. In New York, under the code, the distinction between legal and equitable forms of action has been done away with, and, instead of applying equitable remedies through common law forms, new forms of action have been adopted under which legal and equitable remedies may be alike pursued. This system has also been virtually accepted in Ohio, Missouri, Indiana, Minnesota, Wisconsin, Kansas, and other states not enumerated as belonging to the classes specified above. The states in which distinct courts of equity are maintained are gradually lessening in number, and it is probable that in a few years such courts will cease to exist for the purpose of supervising courts of common law. The last of the chancellors, however, in resigning their duties in this line, may rest satisfied with the knowledge that their personal functions have only ceased because the principles for which their predecessors have struggled have become triumphant.[2] The only division hereafter that will exist on this topic will be between states which apply equitable remedies through the old common law forms, and states which have abolished both the old common law and the old equity forms, and have adopted by code new forms for the common application of common law and equity blended in a harmonious jurisprudence.[3]

[1] See Bispham's Equity, 26 *et seq.*, from which the analysis in the text is mainly taken.

[2] See *supra*, § 33.

[3] The effect of the judicature act of 1873 was to consolidate into a general court, to be known as the supreme court of judicature, all the then superior courts of general jurisdiction, including the high court of chancery, the court of queen's bench, the common pleas, the exchequer, the high court of admiralty, the court of probate, the court for divorce and matrimonial causes, and the London bankruptcy court; the only exception being that the London court of bankruptcy is, under the provisions of the act of 1875, not to be merged with or its jurisdiction transferred to the supreme court of judicature. Of the supreme court of judicature, as thus established, there are to be two permanent divisions, one exercising original jurisdiction and known as the high court of justice, the other an appellate court, known as the court of appeal. The high court of justice is divided into

§ 114. It has been already noticed that not only is law i operative unless declaratory of the conditions of the time a

five divisions, called, respectively, the chancery division, the queen's bench division, the common pleas division, the exchequer division, and the probate, divorce, and admiralty division. These divisions are to have the same general jurisdiction as was previously possessed by the courts whose name they bear. The process, however, in each division is shaped on the same general principles.

In each case the procedure of an "action," as it is called, is begun by a writ of summons on which is endorsed the nature of the relief demanded, or of the claim made. The old forms of suit are swept away, and all that is required is that the plaintiff's case should be set out with substantial precision in a general form prescribed. If the plaintiff in any action claim an equitable estate or right, or claim relief upon any equitable ground, or claim equitable relief upon a legal right, the court in which the suit is brought is entitled to give him the relief which in the old system would be given by the court of chancery. Where, also, a defendant claims any equitable estate or right, or claims relief upon any equitable ground, or sets up an equitable defence, the court before whom the suit is brought is to give such aid as would be given by a court of equity under the old system. And at the basis of the system as thus remodelled lies the principle, established by statute, that if there is a difference on any question between the old common law and the old equity doctrine, then the equity doctrine is to prevail. See Stephen's Com., 8th ed , tit. "Equity;" Roberts's Principles of Equity as administered in the Supreme Court of Judicature, 3d ed., 1877; Trower's Prevalence Equity, London, 1876.

By the 24th section of the judi ture act "injunctions and prohibitic against proceedings in other branc of the court are done away with, l erty being given to use the matter a defence, or to apply for a stay of p ceedings." Roberts, *ut supra*, 360. far as concerns pleading, the old fo of bill is abolished, and the re sought is asked for in the shape c claim. Thus, what was once a for foreclosure is now put in the sh of an "action," in which the "st ment of claim should commence shortly reciting the mortgage un which A. claims, the amount whic is given to secure, and the rate of terest," etc. "To this statemen claim the defendant shall be suppo to state as an *answer* or defence: A traverse or denial," etc.; "and That he has before action brought paid the sum due on the mortgage, gether with all arrears of interest d thereon. And to this defence the pl tiff, in his reply, shall be supposed join issue, and thus to close t pleadings. Or, we will instance action for *specific performance*, wher the statement of claim alleges that t defendant agreed to grant a lease the plaintiff, and had refused to do s and wherein the defendant states his defence that the plaintiff, havi been let into possession, had bro one of the covenants of the propo lease. To this plaintiff may be su posed to reply that he never broke t covenant as alleged; and that if did, such breach had been waived the defendant." Steph., *ut sup.*, iii. 64

In the sixth report of the Pennsylv

place,[1] but that, of all law, susceptibility to differentiation and analogical expansion is a necessary logical ingredient.[2] It has also been seen that, as to the feasibility of permanently settling the law in a code, the analytical and the historical schools differ: the former maintaining, the historical school denying the practicability of final codification. In the general position that the statute law of a state should be systematically digested and arranged, the leaders of the analytical school are unquestionably right. But if they are to be understood as asserting that the law of a country is susceptible of final codification, they are unquestionably wrong. There is no such thing as a self-operative code of jurisprudence, just as there is no such thing as a self-operative code of theology. In neither case is the theory of *opus operatum* sustainable. To enable, in either case, a particular document to be authoritative, its authority must be established by reason, it must be interpreted by reason, its application to the concrete case must be made good by reason. This, as we have already seen, is

Fixity of a code incompatible with elasticity required by evolution.

nia commissioners to revise the civil code (Messrs. Wm. Rawle, Thos. I. Wharton, and Joel Jones), presented in 1835, the fusion of law and equity, on a plan similar to that now adopted in England, is advocated with singular clearness and force.

The Pennsylvania system differs, however, in material respects from that now adopted in England. In England the common law judges have all the prerogatives of chancellors in the use of equity remedies; while so far as the substantive law is concerned, common law principles, as administered by common law judges, now yield, in cases of conflict, to equity doctrines, and consequently, so far as doctrine is concerned, equity, in English jurisprudence, takes the place of common law. In Pennsylvania, however, there being no court of chancery, and the courts, down to 1836, not being invested with the power of using distinctively chancery remedies, it was necessary to mould common law process so as to enable them, as far as practicable, to supply equitable remedies, and to engraft on common law doctrines modifications which in some respects took an intermediate position between common law and equity. The consequence has been (1) to give certain forms of action (*e. g.*, ejectment and assumpsit for money had and received) a flexibility and expansion which had not belonged to them in England before or after the judicature act; and (2) to sanction a system in respect to equitable rights which does not correspond exactly with either the English equitable rule now prevalent in all the English courts, or the old English common law rule. This distinctive system is discussed in a lecture by Mr. McMurtrie, before the Philadelphia Law Academy, in 1880.

[1] *Supra*, § 27.

[2] *Supra*, §§ 14–33 *et seq.*

the case even when a revelation purporting to be divine is presented to us as ruling a particular point. But there is an additional reason why a code cannot be accepted as self-operative. From the very nature of human law, no code can be a finality;[1] all systems of law are subjected to a progression as necessary, though it may be as imperceptible, as that which marks the growth of language. It would be as impracticable to determine the legal rights of a community by a fixed, inelastic code, as it would be to determine its language by such a code. If the conception of law heretofore given be correct, society being mutable, law to be applicable to society must be mutable. A code which fits to-day would not fit to-morrow. For merely tentative and temporary purposes a code may be of use. But for permanent acceptance it can only be effective by being couched in such general terms as would give full play to the popular genesis of new law. But such a document would not be a code in the sense of the analytical school, it would be simply a framework to be filled in by customary law.[2] The objection of want of elasticity, however, it should

[1] *Supra*, §§ 30, 86. That the code Napoleon derives its value from the fact that it represents the popular conception of law, *supra*, § 62.

[2] As to codification of laws of nations, see *infra*, § 122.

"Institutions," says Sir Henry Maine (Dissertations on Early Law and Custom, 1883, 302), "like forms of organic life, are subject to the great law of evolution." In answer to the position of Bentham and Austin that there is "a framework of permanent legal conceptions to which a rational code may always be fitted," he declares that the effects upon law of a mere mechanical improvement in land registration is a very impressive warning that this position is certainly doubtful, and possibly not true.

"The legal notions (those of verification of title), which I described as decaying and dwindling, have always been regarded as belonging to what may be called the osseous structure of jurisprudence; the fact that they are nevertheless perishable suggests very forcibly that even jurisprudence itself cannot escape from the great law of evolution." (Ibid. pp. 360–1.)

"No legislation," says Judge Strong, in an address on the growth of the law, delivered in 1879, "ever has been, none ever can be, active and vigilant enough to make its statutes cover the whole field of the common law, or to provide in advance for the occurrence of unforeseen and often and suddenly arising business complications." . . . The great modern codes "have all been found imperfect. Monuments of wisdom and farsightedness as they were when framed, they have not, unaided, been found sufficient to meet the need of later years, and *they have received constant accretions by*

be observed, goes, not to codification as a stage in legal development, but to codification as a supposed finality. It is not only proper, but necessary, that there should be statutes defining the law in its general relations, these definitions being made as far as possible part of a common system. As has been well stated,[1] "future legislation can, of course, be in no degree hampered by codification." And, as we have already seen, statutory definitions not only do not exclude but necessitate judicial differentiation.[2]

the same processes and through the same agencies as those by which our common law has been developed."

That the German and French codes derive their permanency from their generality is admitted by Sir J. F. Stephen, 3 Hist. Cr. Law.

[1] 1 Steph. Hist. Cr. Law, 351.

[2] *Supra*, §§ 30 *et seq.*

CHAPTER IV.

PUBLIC INTERNATIONAL LAW.

I. Object and Nature.

International law is a law accepted by civilized nations to determine international rights, § 118.

International law part of the common law, § 119.

Not the exclusive product of treaty, § 120.

Appeals to consciousness by right, § 121.

Based on decisions and on common consent, § 122.

Not necessary that there should be a court to enforce it, § 123.

II. History.

In primitive times no such law recognized, § 124.

Tendencies in the middle ages, § 125.

Reformation cosmopolitan, § 126.

Grotius the founder of the modern system, § 127.

Development under Louis XI., § 128.

Natural law prior to the French Revolution, §§ 129.

French Revolution hostile to rights of states, §§ 130.

Congress of Vienna appeals to legitimacy, § 131.

Consequences of fall of Orleans dynasty, § 132.

Modifications by treaty of Paris of 1856, § 133.

Tendencies to absorption of minor states, § 134.

III. Independent Sovereignty, its inviolability and incidents.

Such sovereignty essential to civilization, § 135.

Specific territory essential but not form of government, § 136.

Modes of sovereignty, § 137.

Sovereignties entitled to political deference, § 138.

And to the protection of subjects, § 139.

Recognition dependent on discretion, § 140.

Belligerency may be distinctively recognized, § 141.

Devolution of duty on states seceding, § 142.

Individuality of parent states remain, § 143.

Mutual responsibilities of states and government, § 144.

Governments *de facto* are authoritative, § 145.

Territory inviolable, but modification as to self-defence, § 146.

Exception as to semi-civilized or barbarous states, § 147.

Right to trade secured by law of nations, § 148.

Pledges and servitudes of national property, § 149.

Servitude implied in neutralization, § 150.

IV. Acquisitions of Territory.

Modes of acquiring, § 151.

Land added by accession, § 152.
Prescription gives title, § 153.
Cession does not divest old laws, § 154.

V. Treaties.

Classification, § 155.
Guaranty treaties, § 156.
Treaties distinguishable from contracts, § 157.
must be duly authorized and ratified, § 158.
Only parties bound by, § 159.
Pledges granted in, § 160.
Abrogated by war and other limitations, § 161.

VI. Diplomatic and Consular Agents.

Diplomacy a system of law, § 163.
Ministers sent from government to government, § 164.
Belligerents may be represented, § 165.
Sending and reception a matter of discretion, § 166.
Inviolability and extra-territoriality of embassies, § 167.
Privilege extends to journey, § 168.
Classification, § 169.
Consuls not so privileged, § 170.
May have jurisdiction in foreign lands, § 171.
Exequatur required, § 172.

VII. Intervention.

Permissible in matters disturbing public peace, § 174.
Objections to European intervention in America, § 175.

VIII. Naturalized and other Residents: Slaves.

Naturalization now generally accepted, § 177.
Foreigners subjected to law of place of residence, § 178.
May be excluded, § 179.
Duties pertaining to domicil, § 180.
Slave-trade no longer allowed, § 181.
Nor slavery by non-slaveholding states, § 182.

IX. Right to Sea and River.

Open sea free to all nations, § 185.
Belt of sea within cannon-shot territorial, § 186.
Coast-line, that on which batteries can be placed, § 187.
Ship protected by flag, § 188.
Exception as to territorial waters, § 189.
Ships of war, § 190.
Navigable rivers open to all nations, § 191.
Inland seas territorial, § 192.

X. Right of Search and Condemnation.

Right of search not to be conceded in peace, § 194.
Otherwise as to belligerents in war, § 195.
Vessel seized to be taken to prize court, § 196.
Prize courts to be impartial, and to keep full records, § 197.

XI. Piracy and Privateering.

Piracy an offence by law of nations, § 200.
Privateers not pirates, § 201.

XII. Pacific Remedies for Wrongs.

International wrongs are delicts by law of nations, § 203.
Extent of delicts still undetermined, § 204.
Restitution or indemnity, § 205.
Retortion and reprisal, § 206.
Embargo, § 207.
Mediation and arbitration, § 208.

XIII. War and its Incidents.

War the final appeal, § 209.
Only states can be parties to, but involves all subjects, § 210.
Declaration should be formally made, § 211.
Provisional go[illegible]ab-
lished, § 2[illegible]

Deception and great material destruction allowed, § 213.
Commerce with enemies prohibited, § 214.
Booty not permitted, § 215.
Public but not private property may be seized, § 216.
Distinction in this respect as to insurgents, § 217.
Conflict as to whether sailing under enemy's flag exposes neutral goods to seizure, § 218.
English courts hold that doing business in a foreign land constitutes commercial domicil, § 219.
Seizable property *in transitu* cannot escape seizure by assignment, § 220.
Guerillas, when internationally sanctioned, § 221.
On withdrawal of invasion old system revives, § 222.
Jus postliminii is right of owner of captured property to restoration, § 223.
Maritime law restores captured property on paying salvage, § 224.

XIV. Contraband.

Articles contraband of war may be forfeited, § 226.
In cases of conspiracy ships may be confiscated, § 227.
Question as to dispatches and diplomatic agents, § 228.
Such agents may communicate through belligerent lines, § 229.
Destination of ship imputed to goods, § 230.

XV. Blockade.

Blockade must be effective, § 233.
Notice must be given, § 234.
Vessel running may be confiscated, § 235.

XVI. Rights of Neutrals.

Trade of neutrals to be protected, § 238.
Neutral waters ought not to be invaded, § 239.
Neutrality conditioned by circumstances, § 240.
International and municipal neutrality not convertible, § 241.
Policy of the United States is to maintain neutral immunities, § 242.
Deviation from this policy during the civil war, § 243.
Rules of treaty of Washington limiting neutral rights not of permanent obligation, § 244.
Furnishing funds by subjects of neutral states to relieve belligerents not breach of neutrality; and so of loans, § 245.
Belligerent may be furnished with munitions of war, § 246.
Belligerent recruiting in neutral state a breach of neutrality, § 247.
So of giving passage to belligerent, § 248.
Permitting the fitting out and sailing of cruisers a breach of neutrality, § 249.
Freedom of sale not to be confounded with liability to confiscation, § 250.
Coaling forbidden from a constant base, § 251.

I. Object and Nature.

§ 118. International law is a law generally accepted by civilized nations by which international rights and duties are determined.[1] It is to be distinguished from the *jus gentium* of the Roman law, which was the general system of jurisprudence common to the

International law is a law accepted by civilized nations to

[1] See Johnson *v.* Falconer, 2 Paine, 601; S. C., Van Ness, 1.

civilized communities of Italy; while international law is limited to jurisprudence which concerns the international relations of the civilized world.[1]— That international law is not in the strict sense of the term a "law" is asserted, as we have seen, by the English analytical school of jurists.[2] According to that school, it is essential to the constitution of a law that it should be both prescribed and enforced by a sovereign. International law, however, is not, it is asserted, so prescribed, and cannot be so enforced; therefore international law is not, properly speaking, a "law." This position, however, is not accepted by jurists of the historical school, who hold that law is the product of national forces, and may exist without a specific pen-

determine international rights.

[1] Sir J. F. Stephen, while maintaining, in his history of Criminal Law, that there is no such thing as systematic international law, but only a body of usages, admits that: "Where a definite usage between nation and nation exists, and where there is no special law upon the subject to be found in the statute book or elsewhere, it is undoubtedly part of the law of England that such usage should be enforced as law, and the works of authors on the subject are the evidence by which the existence of such usages is commonly proved." Mr. Austin, also, holds that international law is not properly a law in the technical sense of the term, but is simply a scheme of morality; and the reason given by him is that there is no sanction by which it is enforced. This objection will be hereafter noticed.

Jurists of the analytical school object, also, to the theory of there being a binding standard of international law on the ground that there is no agreement as to the basis of the standard. But we might as well object to the binding character of the common law on the ground that there is no agreement as to the basis on which the common law rests.

According to Blackstone, on the other hand, "both" (equity and common law) "follow the law of nations, and collect it from history and the most approved authors of all countries where the question is the object of that law. In mercantile transactions they follow the marine law, and argued from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum;* in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject; and if the question came before either, which was properly the object of a foreign municipal law, they would both receive information of what is the rule of the country, and would both decide accordingly." Blackst Com., book iii. chap. xxvii.

Mr. Wheaton (Internat. Law, Part IV. chap. iii.) declares that "the maritime law of nations, by which the intercourse of the European states is regulated, has been adopted by the new communities which have sprung up in the western hemisphere, *and was considered as obligatory upon them during the war of the Revolution.*"

[2] *Supra*, § 6; *infra*, § 123.

alty imposed by a sovereign;[1] and the better opinion, as will be hereafter seen,[2] is that to constitute international law as a rule of action it is not necessary that there should be an enforcing international tribunal.—In the United States the question whether there is a definite ascertainable law of nations is settled by legislation and adjudication. The constitution of the United States gives congress the power "to define and punish . . . offences against the law of nations." A Federal statute, passed in the execution of this power, provides for the punishment of piracy, as "defined by the law of nations." This has been held by the Supreme Court of the United States to be sufficient without any further definition.[3] The "law of nations," in the opinion of the court, is treated as a system of jurisprudence in the same way that the English common law is a system of jurisprudence. The same inference may be drawn from English statutes reciting the "law of nations."[4]—The objects of public international law are threefold: (1) It determines national boundaries and other national prerogatives. (2) It defines and maintains the commercial rights of persons engaged in international trade.[5] (3) It settles the privileges of the subjects of each state when abroad, and points out the way in which these privileges are to be defended.[5]

§ 119. According to Grotius, the sources of international law are "ipsa natura, leges divinae, mores, et pacta." The divine law, it may be assumed, is part of the law of nations in all ethical matters in which civilized countries as a whole agree. This is clear in respect to marriage, which, by the law of nations, is monogamous, and legitimacy, which (leaving open the disputed questions of adoption and of legitimation by subsequent marriage) is conceded to all children born in wedlock. By the British government, in an answer, in 1753, to the Prus-

International law part of the common law.

[1] See *supra*, § 26.

[2] *Infra*, 123.

[3] U. S. *v.* Smith, 5 Wheat. 153; *infra*, § 452.

[4] *Supra*, § 26.

[5] For an exposition of the right of nations to international intercourse, see Hartmann, § 15. I desire to express my peculiar indebtedness in the preparation of this chapter to Professor v. Holtzendorf's excellent treatise on the same topic in the first volume of his Rechts. Encyclopedie (ed. of 1882).

sian government, which is declared by Montesquieu to be a *réponse sans réplique*, and which, with this commendation, is adopted by Sir R. Phillimore as authoritative, the law of nations is said to be "founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage." This, in the main, coincides with the "natura" and "mores" of the definition of Grotius; but notwithstanding the commendation it has received, it is unsatisfactory and indecisive. It leaves open the question what conditions constitute "equity," "convenience," "the reason of the thing," and "long usage." We must go further, therefore, if we would find the authorities on which international law is based. And these authorities, as will be more fully seen hereafter, may be found—

(1) In the decisions of the courts of leading nations, so far as these are concurrent.

(2) In the preponderating sentiment of international jurists, including under this head the principles on which diplomatists in common rest.

International law, as thus settled, is part of the common law of England and of the United States. Without a statute on embassies, for instance, a common law court would respect the privileges of diplomatic agents; and without a statute defining piracy, a common law court would define piracy in conformity with the law of nations. Lord Mansfield speaks to the same effect in a famous judgment: "Lord Talbot," he says, noticing an unreported case, the decision in which he adopts, "declared a clear opinion, '*That the law of nations, in its full extent, was part of the law of England;*' . . and . . 'that the law of nations was to be collected from the practice of different nations, and the authority of writers.'"[1]

So, it has been said by an eminent Pennsylvania judge: "The principles of the law of nations . . . form a part of the municipal law of Pennsylvania."[2]

The same position is taken by Chancellor Kent,[3] and, as has been seen, by Blackstone.[3]

[1] Triquet *v.* Bath, 3 Burr. 1480.

[2] McKean, C. J., Resp. *v.* Longchamps, 1 Dall. 111.

[3] 1 Com. 3.

It may then be regarded as settled that international law, both public and private, is part of our common law, and (subject to the limitations of our distinctive legislation) will be enforced as such.[1]

[1] 1 Whart. Conf. of Laws, § 1.

Sir R. Phillimore, i. 525, quotes a judgment of Lord Lyndhurst to the effect "that the law of nations is part of the law of England; and consequently that this offence (exciting a revolt against a foreign state) will be tried and punished in England, though only on such evidence as shall seem adequate to an English tribunal."

The Territorial Waters Jurisdiction Act (41 and 42 Vict.) recites the "law of nations" as determining territorial sovereignty." *Supra*, § 26.

As to the authority of writers on international law, see Phill., op. cit., p. 62. Grotius is the first of the great writers in this line, and though obtaining but little aid from prior specialists, his opinions are constantly cited as laws by the courts. Undoubtedly great conflicts of opinion on material points have arisen; but when there is a great preponderance of opinion on any particular point, that opinion will be held law in proportion as it approaches unanimity. "In cases where the principal jurists agree," says Chancellor Kent, "the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law." Kent's Com., i. 19.

Savigny, true to his distinctive theory of the origin of law from national need and conscience, explains the uniformity of opinion among civilized nations on international law by adverting to a common juridical consciousness among civilized nations as to their reciprocal relations.

That international law is progressive and adaptative is shown by Hartmann (Institutionem des praktischen Völkesrecht's, 2d ed., 1878), § 2. "Ut mores gentium mutantur sic, et mutatur jus gentium." Bynk. Præf.; and see *supra* § 26. As to change of law in respect to territorial waters to correspond with extension of range of guns, see *infra*, § 186.

Heffter divides law (Recht) into guaranteed law and free law, which last is self-perfective and self-enforcing. International law, he declares, belongs to the last category. A civilized state, he argues, cannot reject this law without forfeiting its position among other civilized states. It is therefore, so he holds, the freest of laws, as it is not subject to judicial compulsion. "Its organ is public opinion; its final arbiter is history."

Blundtschli (Mod. Völker. Einleit. 1, 2), virtually following Savigny, argues that "Wherever permanent business relations are established between nations, there the mutual convictions of the parties will establish an international system. The feeling of this need of law and the sense of what law should be, belong to all men, but reaches a higher level with civilized nations.

In determining what is the international law on any incidental point, the Roman law is to be entitled to high respect if it determines such point; and such also is the case with the canon law, in all matters within its range. This, as to the canon law, is

§ 120. International law, whether public or private, therefore cannot be permanently established by treaty. Even should we suppose that a complete code could be adopted by all civilized states, such code could be repudiated even by a minority of the contracting states. The congress of Vienna was attended by all the great European powers, and these powers (England withholding her assent yet making no earnest opposition) held that it was a part of the law of nations that when a legitimate sovereign was attacked by his subjects, it is the right and duty of other legitimate sovereigns to intervene for his support. Yet, in a very few years, there was not a single state among those represented in the congress that did not repudiate its conclusions. Russia sustained the revolt of Greece against Turkey; France and England sustained the dismemberment of Holland by the creation of Belgium; and both Louis Philippe and Napoleon III. were successively recognized by Prussia, Austria, and Russia. No agreement as to international law by sovereigns can permanently bind the civilized world, nor is it right that it should. New necessities may of themselves make new laws without the intervention of sovereigns. New necessities may repeal old laws to which sovereigns had solemnly assented. Nor can the

International law not exclusively the product of treaty.

agreed to on all sides. The canon law (as existing before the Reformation, and consequently before the Council of Trent) is the law which, unless altered by local statute, determines the condition of marriage both in England and the United States; and on the canon law our laws of succession are based. But to the Roman law, also, English and American jurists constantly appeal in all matters within its range. Sir R. Phillimore (i. 34) gives as an illustration the appeals made to the Roman law by the United States in 1792 in the controversy with Spain. And he goes on to say: "And to all nations, whatsoever and wheresoever, this law (the Roman) presents the unbiassed judgment of the calmest reason, tempered by equity, and rendered perfect, humanly speaking, by the most careful and patient industry that has ever been practically applied to the affairs of civilized man."

While neither the Roman nor the canon law are among the specific sources of international law, so argues Hartmann (§ 6), following Gunther, i. 32, they have exercised much influence on its development, partly because the Roman law is the basis of the jurisprudence of most civilized nations and is appealed to by them in their international conferences, partly because the British and American admiralty courts are impressed, though to a less degree, by the same influence.

world be regenerated by a scheme of *à priori* legislation, nor springing from the conditions of the particular era and of the particular wants to be met.[1] At the same time when special rule has been recognized as binding by a series of treaties, it approaches to general international law in the proportion in which these treaties represent the civilized world as a whole.[2]

Appeals to consciousness of right.

§ 121. Whether there is a moral sense which can be appealed to as an arbiter is a question which has been already discussed.[3] It is enough here to say that the fact that nations, as well as individuals, have uniformly appealed to such a moral sense. In what way such moral sense originated is immaterial. It may be that, as taught by Butler, this morality is implanted by God in each individual breast. It may be, as we are told by Spencer, that, as it now exists, it is moulded by descent through a long series of generations, and takes in each generation the shape which, on the whole, is most conducive to public good, the question of its origination being left in abeyance.[4] But be this as it may, the practice, on the part of nations, of appealing to such a moral sense in their dealings with each other is universal. This has been done by the haughtiest of nations, as well as by the feeblest; in periods the most primitive, as well as the most recent. In the old testament this appeal is recorded in almost every case in which we hear of one nation making war on another nation. Homer's heroes, in the addresses they delivered before their combats, appealed to the moral sense of their audience, whatever it may have been; even the Roman generals, in their proclamations and negotiations, made the same appeal. We have a conspicuous illustration to the same effect in our own Declaration of Independence, which is on its face an appeal to the moral sense of the civilized world to vindicate the righteousness of the Revolution. But we are not alone in taking this position. In the wars consequent on the French Revolution, every combatant, in turn, appealed to an international sense as

[1] *Supra*, §§ 15 *et seq.*
[2] Perels, Int. Seerecht, 1882, 4.
[3] *Supra*, §§ 16 *et seq.*
[4] *Supra*, § 106.

existing, and endeavored to make it appear that his conduct could be so explained as to be in conformity with such moral sense. As hypocrisy is the tribute which vice pays to virtue, so the manifestoes in that stormy era may be regarded as the tributes paid by ambition to an international moral sense. The congress of Vienna strove to justify its action by the same appeal. Cavour, when leading in the revolt against the settlement of the congress of Vienna, issued paper after paper in which the course of Italy was justified on moral grounds, and the civilized nations of the world were called upon to approve the righteousness of the uprising. The letters of secretaries of state to their diplomatic agents in foreign lands, lands, written for the purpose of being read to the authorities of the state in which such agents are resident, are appeals of the same class; and if we take up the volumes containing the diplomatic correspondence of the United States, as published from year to year—and what is said in reference to this country in this respect is applicable to all other countries—we shall find that by far the greater part of their contents, omitting the merely narrative portions, consists in appeals to the moral sense. If the existence of the common law is shown by the fact that though unwritten, and therefore in a measure unprecise, it is appealed to by all litigants in states in which such a common law exists, then the existence of a common moral sense among nations may be shown by the appeals to it made in all cases in which there are supposed national wrongs to redress or national rights to vindicate. And whatever may be the opinion of speculative thinkers, there is no case on record of a statesman, dealing practically with diplomacy, who has not over and over again appealed to this moral sense of nations as an existing fact.[1]

§ 122. It is not, however, to be supposed that international jurisprudence does not rest, in a measure, on positive law. It does, though the positive law on which it falls back is not that of a code which remains binding until repealed by the body by which it was enacted.

International law based on decisions and on common consent.

[1] No more striking example of the position in the text can be found than that in the diplomatic correspondence of the United States during the late civil war.

If we examine the decisions of our courts on any question of international law, we shall find the ruling to rest on positive law, though not of a law absolutely and finally imposed by a congress of nations. In the first place, a court is bound by a treaty adopted in conformity to the prescriptions of the *lex fori*. If our Federal government, for instance, should duly execute with a foreign power a treaty providing that privateering should be illegal as between the two powers, our courts would be bound to hold the treaty the supreme law of the land.[1] In the second place, if our courts and those of England should unite in declaring any proposition of international law to be binding, there is a strong presumption in favor of the correctness of such a proposition. It is a matter of regret that the same respect cannot be paid to the decisions of continental courts, the judges who give such decisions not being bound by any system of precedent. This defect, however, is compensated for by the treatises of eminent jurists;[2] and it may be held to be settled that rules which are adopted by the weight of authority among jurists, and which are accepted by English and American courts, are to be regarded as incorporated in our public international law. In the third place, a custom which has been generally adopted among civilized nations may be regarded as a part of public international law.[3] If, for instance, the great majority of civilized states should denounce the reducing of prisoners into captivity, or the use of poison as an engine of mischief, we should have a right to regard the positions so taken as part of public international law; and, in fact, it is in this way that public international law has been in the main built up. There are, however, two important distinctions to be observed: (1) Rules of public international law, in order to lose their effect, need not be solemnly repealed by the parties enacting them. The rules of the congress of Vienna, for instance, ceased to be effective when repudiated by even a minority of the principal powers by whom they had been adopted. (2) Unanimity is not necessary to establish a rule in public international law. If it were, few

[1] *Infra*, § 383.

[2] In this connection the proceedings of the Institute of International Law deserve particular study.

[3] *Supra*, § 14.

such rules could be established. It would be always a matter of doubt whether all the states requisite to unanimity had been consulted, since there will always be some states whose claims to be recognized as authoritative in such respects are doubted. And there are no rules of which we can say they have been adopted either by treaty or by usage on the part of all states entitled to speak on such an issue. The question is one of weight of authority; and this question must be decided in each country on the concrete case. It may be added that, as between any two countries, a rule may be adopted, though not of general acceptance. Common consent, also, may be inferred from recitals in proclamations of sovereigns, and from statutes passed by legislative bodies having jurisdiction, from maritime ordinances, as well as from the decisions of courts.[1]

[1] The usages which obtain between nations as an aggregate are as much a part of international law as are the usages prevalent in a nation a part of national law. In this sense we are to understand the maxim of Bynkershoek: "Ipsum jus gentium, quod oritur e pactis tacitis et præsumptis quae ratio et usus inducunt." (Quæs. Jur. Pub., I. iii. c. x.)

Lord Stowell rests his judgment in the Santa Cruz on a "law of habit, a law of usage, a standing and known principle on the subject in all civilized and commercial countries." 1 C. Rob. Ad. 61. It was ruled in this case that custom may modify a treaty. That a local law of neutrality does not bind internationally, see *infra*, § 241.

Codification of international law has been proposed in high quarters, but, for the reasons above suggested (see *supra*, § 114), it would be difficult to give any code a permanent cosmopolitan force. But, while this is the case, it is impossible to be blind to the great value, as independent treatises, of Mr. David Dudley Field's proposed code, and of Bluntschli's "Moderne Völkerrecht als Rechtsbuch dargestellt" (Nordlingen, 3d ed., 1878). Mr. Bentham (Bowring's ed., vol. viii.) has given us also some valuable material for the same purpose; and Holtzendorff (op. cit., 1204) refers us to a paper to the same effect by Prof. Katchenowsky, of Charkow. From Mancini, also, we have a treatise entitled "Vocazione del nostio secolo per la riforma e codificazione del diritto delle gente," 1872, and from Bulmering an essay on "Kodification des Völkerrechts," 1874. Holtzendorff, while holding that as to the police of the seas, the slave-trade, the fisheries, the submarine telegraph, the diplomatic service, and private international law, there might be codification, maintains that it would be impracticable in respect to annexation or aggrandizement of states, the recognition of new states, or the intervention in the affairs of other states. I do not think that private international law could be the subject of present codification. As to expatriation, or civil *status*, for instance, we are not, by any means, ripe for a settlement. See, as to codification, *supra*, § 114.

§ 123. Mr. Hall, in his treatise on International Law (London, 1880), declares that "International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement. These rules," he goes on to say, "may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered; or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them." By Mr. Hall, the second view is assumed to be correct, and in this Mr. Pollock[1] concurs. This position does not differ widely from that expressed in the preceding pages in reference to national law. National law, it is there stated, is the product of a nation's conscience and needs.[2] It is law before it is formulated by legislation or judicial decision, just as custom is law before so formulated, and, when formulated by judicial decision, is declared to govern cases which occurred before such decision. It is not, in such cases, declared that the custom was the custom of everybody, but simply that it was a general custom; nor, if it was an established custom, is it necessary, as we have seen, that it should have existed from time immemorial. So it is with international law. It is not absolute, nor can it be pretended, as was once erroneously supposed to be the case with the common law, that it existed at some prior period in perfect symmetry, and only requires excavation to bring it to light. It is based on the customary law of nations, just as national law is on the customary law of individuals. But it cannot be said that international law is not law because it cannot be enforced. Whenever international law becomes an incident in litigation it is as capable of being enforced as is customary law. When piracy, for instance, is prosecuted in our courts, they resort

Not necessary to law that there should be a court to enforce it.

[1] Essays, etc., 1882.

[2] *Supra*, § 16.

to the law of nations to know what it is; and so with innumerable questions relative to the relation of neutrals to belligerents, and to the inviolability of national ships and territory. A prize court, in fact, may be defined to be a court to enforce the law of nations; and so, in some of its lines of adjudication, may be held to be the supreme court of the United States. It is true that, when relating to matters out of the sphere of litigation, the law of nations cannot be enforced by judicial decision. It is not peculiar in this. It is a part of the common law that a man may defend himself when attacked, but there is no legal process requiring him to exercise this right. There are certain rights that can only be vindicated by force on the part of those aggrieved, and by the sympathy, if not the aid, of right-minded bystanders. This is the case with the rights of nations not the subjects of litigation. It cannot be said that there is no law in this relation because there is no court to enforce such law. An aggrieved nation, like an aggrieved individual, may vindicate its rights by force in all cases in which there is no aid to be obtained from the courts. And an aggrieved nation will, as a general rule, find aid, if it be in the right, from other nations, just as an aggrieved individual will, as a general rule, find aid, if he be in the right, from other individuals.[1] Nor is this all. There is no process of formal sequestration, it is true, by which an offending nation can be placed under the ban of civilization. But it may be excluded from all diplomatic and commercial relations with other states, and in this way a punishment may be inflicted not unlike the punishment of exile or of sequestration imposed on individuals.

II. History.

§ 124. The primitive idea of nationality was absolute independence. It is true that a confederation between particular states was frequently instituted, to which the particular members composing it were loyal as long as they found it convenient; but where there

In primitive times no international law recognized.

[1] See as dissenting from position of text, 2 Steph. Hist. Cr. Law, 34–6; and remarks of Lord Coleridge in R. v. Keyn, L. R. 2 Ex. D. 63.

was no confederacy, absolute independence of such state was maintained. Each state did as it chose; and the only way any state could enforce right, or resist wrong, was by war. In some cases this isolation was aided by geographical considerations; in others by artificial demarcation, as in the case of the Chinese wall. Either all intercourse with foreign states was to be excluded, or it was to be carried on under the hypothesis of the subjection of the foreigner to the home-yoke. War and colonization, among the nations of the old world, were the only means by which at the outset trade could be pushed outside of the national bounds. The influences which tended to break down this seclusion were (1) the adoption of the Greek language by the literary classes of all civilized nations; (2) the acceptance among these classes of Greek philosophy in the place of the local religions; and (3) the extension of the Roman *jus gentium* in juxtaposition with the *jus civile*, by which the legal rights of distinct nationalities were recognized.[1] Jewish history gives us, it is true, several illustrations of treaties between the Jews and neighboring nations; but although there are frequent appeals in the sacred text to righteousness as the basis of dealing with strangers, the code laid down in the Old Testament is exclusively provincial, and contains no provisions for a system of law to bind all the nations of the world as a body. The New Testament is cosmopolitan, but the New Testament, while enjoining peace and good-will to all mankind, leaves civil legislation to the exclusive action of the state. In Greece, while the Amphictyonic League established a federal relationship between the several states of Greece, foreign states, with whom there was no treaty of friendship, were looked upon as enemies, with whom no terms were to be kept. By Rome, while as a matter of jurisprudence, the *jus gentium* was placed on a wise and broad foundation, foreign states, not allied by treaty, were

[1] See on this topic Holtzendorff, Öff. Recht, in Ency., 4th ed., § 2; citing Laurent, Etudes sur l'histoire de l'human. 1st vol.; Müller Joehmus, Geschichte des Völkerrechts, 1848; Ward's Enquiry into History of Law of Nations, London, 1796; Pierantoni, Tratato de diritto internazionale, 1881.

the object of spoilation unrestrained by sense of right, or by rules of international justice.[1]

Tendencies towards an international system in the middle ages.

§ 125. The genius of ancient Rome, however, both for conquest and for organization, destroyed all sovereignty in civilized countries except that established by Rome itself. There was a law of nations, but it was a law Rome dictated. It was not until the dissolution of the Roman empire that independent sovereignties asserted themselves; and the sovereignties thus established were based on the distinctions of race, not on those of territory. Persons belonging to particular races were, in many instances, governed by their own national laws, no matter where they dwelt; and hence, within the same territory, there might be several distinct systems of laws governing distinct nationalities, just as there are in some states in the United States a law for the people of the state as a body, and a law for the Indians who happen to be residents within the state. This tended to depress mere territorial particularism; and other influences intervened to establish a cosmopolitan jurisprudence at least in matters of trade and of civil rights. Civilization was then divided between two great religions, which, greatly as they differed in other respects, at least agreed in refusing to be limited by national bounds. So far as concerns Christian Europe, in the earlier period of the middle ages, the pope assumed the character of an international judge, subject more or less to the limitation of councils, which were international congresses, each sovereign being distinctively represented and entitled to an individual vote. So supreme was the pope in matters international, that even as late as 1493, the papal bull, confirming the title of Ferdinand and Isabella to their discoveries in the new world, was recognized as giving title by all the sovereigns of Europe. In Europe, also, the German emperor claimed to represent the emperor of Rome, and to subject all Christian states to at least nominal subordination. Under these influences the intercourse between separate nationalities was facilitated. Bills

[1] Sir R. Phillimore, lxviii., quotes appositely on this point the following from Lucan: "Sed neque jus mundi valeat neque foedera sancta Gentibus." Phar. x. 471.

of exchange took their origin, so it is said, in 1250; shortly afterwards consuls were established in prominent cities for the purpose of facilitating trade. The peculiar position of the Jews had a good deal to do in extending this community of business. The Jews were not recognized as the full subjects of any particular sovereign. They were in many states subject to their own personal law; in all states they were cosmopolitan and not national; they formed, therefore, as a ubiquitous class of expert business men, an admirable agency for establishing a cosmopolitan scheme of business law.

Tendency of the reformation to cosmopolitanism.

§ 126. The reformation, it might at the first glance be supposed, would have been likely to have re-established insulation among the great European states. The international influence of the papacy, which has been generally used in the interests of peace and of free intercourse between states, received a severe shock. The supremacy of the German emperor ceased to be even a shadow. Territorial supremacy, therefore, was relieved from what might have been supposed to have been the two most important checks by which it had been restrained. But there were tendencies on the other side which did more than take the place of those thus passing away. The Jews were in a large measure relieved from proscription, and their office, as the exchange brokers of civilization, gave a largely increased impetus to international commerce, and almost universal currency to the rules of trade adopted by them. Protestantism, also, while it added to the authority of state governments, which are local, added still more to this authority of the individual conscience, which is cosmopolitan. The civilized world is no doubt an aggregate of independent states, which may have little in common with each other, but it is also an aggregate of independent consciences, which have a great deal in common with each other. And then the opening of the East India passage and the discovery of America, gave to Christian sovereigns trusts which they held more or less in common, and for the management of which they were compelled to adopt common rules.[1]

[1] As authors on the Roman Catholic side, in whose works the claims of cosmopolitan politics are vindicated, Holtzendorff (op. cit.) mentions Vic-

§ 127. The work of Grotius, De Jure Belli et Pacis, which appeared in 1625, is the earliest systematic treatise on public international law. Several important circumstances contributed to the fulness and fairness of this work. In the first place, the Westphalian peace, by which the thirty years' war was terminated, established a pacification which settled terms of international relationship between the great states of Germany. In the second place, a number of treatises had emanated from divines of both confessions on the duties incident to war, and these treatises in the main agreed. In the third place, Grotius possessed remarkable abilities and remarkable experience for the work of codifying those opinions. But the merit of his work

Grotius, the founder of the modern system.

toria, a Spaniard (1480–1586); Sata, also a Spaniard, 1494–1560, who denounced unjust war and the slave-trade; Franciscus Suarez, a Spaniard (1548–1617), who took the same position; Balthazar Ayala (1548–1584), a Spaniard, who also attacked the practice of reducing into slavery those taken in battle; Albericus Gentilis (1551–1608), a Protestant, who discussed the rights of ambassadors.

The pope and the Catholic councils were not the only international arbiters during the middle ages. It was towards the close of the middle ages that embassies from sovereign to sovereign were instituted and consuls appointed, and that maritime codes, binding ships of all nationalities, were proposed.

In England, the Reformation, as far as concerns the Roman and the canon law, was far more radical in its operations than it was on the continent of Europe. "The books of civil and canon law," said Ayliffe (Ayliffe's Oxford, i. 188), in a passage cited by Sir R. Phillimore (Int. Law, 3d ed., xxx.), "were set aside to be devoured by worms, as savouring too much of popery." When this wave was at its height, in 1536, Cromwell, as chancellor of the University of Cambridge, secretary of state, and vicegerent in matters spiritual, issued under the name of the king, a declaration which stated, *inter alia*, "that as the whole realm, as well clergy as laity, had renounced the pope's right, and acknowledged the king to be the supreme head of the church, no one should hereafter publicly read the canon law, nor should any degree in that law be conferred." Ibid.

But a reaction took place in the reign of Edward VI. and of Elizabeth, and the study of the civil as well as of the Roman law was enjoined on both universities, in each of which, even in the time of Henry VIII., a professorship of the civil law had been established.

In Elizabeth's time questions of international law were submitted to advocates in Doctors Commons (see Hallam, Const. Hist. I. 218); and Cromwell referred to a commission of civilians an important question in reference to diplomatic privilege.

is primarily due to himself. He is in the first rank of publicists both for strong sense, philosophy, and humanity.[1]

Development in the time of Louis XIV.

§ 128. The ambition of Louis XIV. seeking to realize the scheme of French European dominion conceived by Richelieu and Mazarin, led to constant appeals to the law of nations on the part of the allies whose headquarters were at Hague, and whose leader was, during his whole period of political activity, William of Orange. Louis XIV. represented force and intrigue. Force and intrigue were undoubtedly employed by the allies, but they put their case on certain fixed principles of high political morality.[2] The sovereignty of small states was to be as much respected as the sovereignty of great states; the right of blockade was to be restricted within reasonable limits; the independence of neutrals was to be rigorously maintained; contraband of war was to be defined in a way compatible with the growth of neutral commerce; no one state was to obtain a dominancy by which the independence of others would be hazarded. These principles were maintained by the allies in their contest with Louis XIV., and were virtually incorporated into the public law of Europe. It is true that the peace of Utrecht was attacked at the time as yielding to France advantages to which in her then depression she was not entitled. But that peace gave a final destructive blow to the claim of any one state to supremacy in the family of nations. Neither Austria nor France obtained the Spanish crown. The right of any one state to dominate the seas, and to impose its own construction on the law of blockade and of contraband of war, was solemnly and decisively condemned. A settlement of

[1] Of Grotius's treatise, Sir R. Phillimore (I. xxii.) says "that no uninspired work has more largely contributed to the welfare of the commonwealth of states. . . Grotius first awakened the conscience of governments to the Christian sense of international duty."

[2] Not only did Marlborough constantly appeal to civilians during his negotiations with the allies, but in the negotiations preceding the peace of Utrecht the English ambassadors were directed to follow the advice of the civilians whose opinions had been taken. Boling. Corr., I. 4; Phil. Int. Law, 3d ed., I. xlvi.

Europe also was made, which assumed that thereafter no one power was to be permitted to dominate the continent.[1]

§ 129. To a Swiss, Vattel, we owe a work, appearing in 1758, which is the most lucid exposition of the doctrine of natural law then prevalent.[2] Vattel was much more of a doctrinaire than was Grotius; and by doctrinaire statesmen, as well as by statesmen whose political interests lead them to maintain the independence of small states, he is cited as the leading authority. Citations from Vattel formed part of the lectures with which George Grenville is said to have so much fatigued George III.; and whenever undue interference with the rights of other states was threatened, or undue attacks on old prerogatives, then Vattel was appealed to. But it was soon seen that Europe could not be kept in a permanent equilibrium in which each state would maintain its relative strength. No treaties, no philosophical speculations, could keep Spain and Sweden in the position of first-class powers; no guarantees, no matter how solemn, could make Holland permanently the rival of England on the high seas, or maintain the supremacy of Austria in Germany, or prevent Prussia and Russia from

Natural law as held prior to the French Revolution.

[1] "The treaty of Utrecht," so Mr. Hosack closes his treatise on the rise and growth of the law of nations, London, 1882, "terminated an important period of modern history. After the decline of the feudal system, and the rise of the great continental monarchies, we find that at three different epochs three powerful princes threatened the peace and the independence of Europe. But Charles the Fifth found a Maurice of Saxony, Ferdinand the Second a Gustavus Adolphus, and Louis the Fourteenth a Marlborough to oppose and overthrow their deep-laid schemes of aggrandizement. We may, perhaps, conclude from these and from subsequent examples that since the establishment of standing armies it is the tendency of some particular state to become too powerful for the peace and tranquillity of its neighbors. For this state of things there is, as all history proves, but one remedy. The notion of preserving the balance of power in the European system has been derided by many writers in the present age, and it is true that to maintain a perfect balance is impracticable. But the instinct of self-preservation is paramount among nations as among men, and we may rest assured that the rise of any European power to an exorbitant degree of power would lead to results similar to those that have been again and again witnessed in the past." See Seeley's Expansion of England, 77.

[2] Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains; a new edition, by Pradier-Fodéré, appeared in Paris in 1863.

becoming first-class powers, or avert the partition of Poland The peace of Versailles (1783), in which England, France Spain, Holland, and the United States united, introduced a new and most important principle. There is nothing in the law of nations, so this pacification solemnly attests, which condemns a revolt of a colony when successful; and foreign states, interfering in such revolt on behalf of the insurgents will be admitted by the offended state as parties to a general pacification by which the independence of the revolted state is affirmed. Two conflicting elements become from this time discernible in the sphere of public international law. The first is that of humanitarianism, seeking to subordinate all political communities to a general law based on morality. The second, while admitting that morality should govern nations as well as individuals, maintains that there can be no absolute and universal standard of morality; that what is moral depends more or less upon circumstances; and that when nations differ in this respect, force must determine.[1] There is, no doubt, much truth in the position that nations cannot be governed by any speculative system of political philosophy; and that Vattel, so far as he sought to establish a universal code, failed. At the same time it cannot be denied that in making morality the final standard for nations, as well as for individuals, he did a great work. Men have since then differed as to what was politically moral, but none have undertaken to vindicate a cause whose immorality they admitted.

French Revolution hostile to rights of states.

§ 130. The French Revolution, in its early enthusiasm, set forth a humanitarianism which tended to extinguish all nationalism; in its later stages, an exaltation of nationalism which tended to extinguish all humanitarianism. Not only when the Revolution reached its climax were foreign nations declared to be entitled to throw off their old governments, but they were forced to do so; what were called republics were established in Italy and in Belgium; and finally, under Napoleon, the German Empire was swept away, and princes from Napoleon's family

[1] As the representative of the latter view is cited J. J. Moser, whose Versuch des neuesten Europaischan Völkerrechts was published in 1778.

were placed on the thrones of Spain, of Holland, of Westphalia, and of Naples. Napoleon dominated the land, and established the continental system by which all foreign goods were confiscated, unless received under French permit, while England controlled the sea, claiming to capture all vessels sailing to French ports. In this collision, neutral rights, on the continent, almost ceased to exist. Each of the two great combatants did what subserved his own interests, and appealed to the law of nations chiefly as an argument against his adversary, rarely, as a rule, for himself.

§ 131. The congress of Vienna found international law in a state of chaos. The object of the congress, of which Austria, Prussia, Russia, France, and England took the control, was to constitute by treaty a new and permanent system of European public law. The system thus instituted, to which England, however, gave only a partial and temporary assent, was mutual insurance by the legitimate sovereigns who were parties to the contract. As a preliminary measure a partition of Europe was made in such a way, it was alleged, as best to establish the equilibrium of power, but really as best to subserve the interests of the principal contracting parties. England's colonial conquests were secured to her; Gibraltar was to be retained by her, and she received a large portion of the indemnity levied on France for the expenses of the occupation. The partition of Poland, iniquitous as it was, and hostile to the principles of legitimacy the congress was supposed especially to represent, was validated. Parts of Saxony, which had been loyal to Napoleon to the end, were given to Prussia, whose alliances with him had been only temporary. Nothing was done to interfere with the pretensions of England to a control of the high seas; all that the congress did was to establish what was called a "Holy" Alliance between the four leading continental powers, by which the equilibrium or balance of power then existing was to be made permanent. The alliance was not of nations; it was of sovereigns, and was purely despotic. No matter how atrocious might be the invasions by a sovereign of his people's constitutional rights, there was to be no interference by his allies. But if a nation should rise up to vindicate its

Congress of Vienna appeals to legitimacy.

rights, then the other sovereigns were to intervene. It manifest that such a system contained in itself the seeds dissolution. It was based on an assumption no longer tole able, that of the divine right of kings; and the very monarc who claimed to be thus *jure divino* entitled to rule Europe perpetuity—the emperors of Austria, of Russia, and of Russ —owed their titles not to legitimacy, but to treaty, to revol tion, or to conspiracy. Wellington and Castlereagh, wh appeared for England, conscious that if legitimacy were th test, the prince they represented would have no title to th throne, and that if they should announce that legitimacy wa to rule the world all England would be in a revolt, were care ful to say nothing to sanction the legitimistic pretensions. And very soon the alliance proclaimed by the congress received a death-blow. It is true that at the congress of Laybach (1821) the allies, in the teeth of remonstrances from the English gov- ernment, undertook to regulate Neapolitan and Spanish affairs, and in the congress of Verona, in 1822, authorized France to march troops to support the Spanish king against his own revolted subjects. But when the South American dependencies of Spain and Portugal declared themselves independent, their independence was recognized by England, Canning, then prime minister, making the memorable statement, that in this recognition he had invoked the new world to redress the balance of the old. Nor, audacious as this appeared, was it a mere personal or party boast. The tory administration of Wellington, which succeeded that of Canning, ratified not only these recognitions, but the alliance with the revolutionary government of Greece in its revolt against the legitimist government of Turkey. And as a final shock to the Holy Alliance came the revolution in France, by which the Orleans family were placed on the throne, and the consequent support given by France and England to the Belgian repudiation of Dutch authority, by which Belgium, which had been solemnly assigned to Holland by the congress of Vienna, was made an independent state. The congress of Vienna, therefore, embodying the reactionary temper of conservatism, seeking to wipe out the work of the French Revolution, was as ineffective in establishing a permanent system of international law, as had been the revolution

whose action it undertook to correct. The attempt to base a unity of nations on legitimacy had failed, as had the attempt to base that unity on the sentimental humanitarianism of the early French revolutionists, or the military ascendency of Napoleon I.[1]

§ 132. The downfall of the Orleans dynasty in 1848 had several remarkable international effects. The catastrophe, in the first place, was induced by two conspicuous acts of Louis Philippe, on which it placed the seal of condemnation. He had alienated not only his European allies, but a large portion of his own subjects, by the underhand management by which he attempted to place one of his sons on the throne of Spain; and he was untrue to the popular element in the constitution which he had accepted when called to the throne. His overthrow would not have been so complete had it not been felt that he had been disloyal, not only to his own principles, but to the principles of fairness and self-restraint in dealing with other states. His fall, therefore, which there was not a hand among his brother monarchs lifted to arrest, or a voice in foreign nationalities lifted to lament, showed that there was a conscience among princes as well as people, which would resent underhand attempts at aggrandizement, if not disloyalty to constitutional pledges. But the consequences of the fall of Louis Philippe were still more remarkable. The impulse which drove him from the throne almost revolutionized central Europe. The ruling family of Austria was saved from deposition, it is true, by the intervention of Russia, and the king of Prussia was aided in his efforts to suppress the national movement of 1848 by Russia and Austria. The Holy Alliance, therefore, in this way asserted itself by the interposition of Russia as the protector of the sovereigns of Prussia and Austria from revolution. But this was the last appearance on the political stage of Prussia, Austria, and Russia as reciprocal guarantors; and the exceptional excuses that were given for the interference of Russia showed that the permanent alliance of the congress of Vienna had ceased to exist.

Consequences of fall of the Orleans dynasty.

[1] See on this topic, Holtzendorff, *ut sup.* § 1197; Lawrence, Commentaries sur les Elements de droit int., 4th vol.; Pierantoni, Storia del diritto int., 1876.

§ 133. The object of the treaty of Vienna was to perpetuate in Europe the dynasties that existed prior to the French Revolution, and especially to exclude all members of the Bonaparte family from political power. The result of the French Revolution of 1848 was to give the presidency of the new republic to Louis Napoleon Bonaparte, whom Napoleon I. had designated as his heir; and subsequently, by a *coup d'état*, sanctioned by a popular vote, Louis Napoleon became emperor, the dynasty being re-established in his family. It might have been supposed that the sovereigns whose predecessors had united in putting the Bonaparte family under the ban would have interfered, had they the power, to prevent this defiance of the adjudications of the Vienna Congress. But they had not the power, and, even if they had, it is questionable whether any one of them would have had the temerity to undertake a second war for the establishment of legitimacy in France. The general acquiescence, therefore, in the restoration of the Bonaparte dynasty in France signified a general acquiescence in the repudiation of the duty of intervention in favor of legitimacy which the Vienna Congress proclaimed. And it is a remarkable fact that the re-establishment of Napoleonic imperialism in France, so far from being regarded with anger or fear, was welcomed by the other great powers. It was plain that France would not tolerate either of the Bourbon dynasties; and the Orleans family in particular had always been disliked by the courts of Russia and Austria, and had made itself detestable in England by its intrigues for the possession of the Spanish throne. The only alternatives, therefore, were the republic and Napoleonic imperialism. The republic had already sufficiently exhibited its capacity for revolutionary propagandism to make it the object of unqualified dread and dislike on the part of the continental courts; and not only was the revival of Napoleonism, which claimed in its new attitude to be a system of peace, in itself preferable to republicanism, which was war, but Louis Napoleon took the first opportunity to show that his policy was to be conservative, so far as the established institutions of Europe were concerned. England had been the most implacable

Modifications by treaty of Paris of 1856.

adversary of his uncle, and to England the first French empire had finally succumbed; but in England Louis Napoleon found a kindly welcome during his exile; he had been received as a prince by the English aristocracy, and had served as a volunteer policeman during some momentary disturbances in London; he took the first opportunity, when elected president, to announce his determination to establish intimate political relations with England; and outrageous as was the *coup d'état*, it received the cordial support even of leading English statesmen. Nor was he less successful in conciliating the autocratic courts. He found, when he entered on the presidency, Rome under the control of a popular government which had been aided by the French republican authorities; he withdrew the French troops, and co-operated in the re-establishment of the pope. It is true that in part from his determination to take a leading position in Europe, in part from an irrepressible tendency to conspiracy, which was one of the chief features of his remarkable character, he showed no reluctance to engage in war; and the first war into which he entered led to important consequences in the domain of international law. Turkey, so it was alleged, was threatened with destruction by Russia, the consequence of which would be the control by Russia, not only of the mouth of the Danube, but of the Eastern Mediterranean. England was the state most exposed to injury by such an aggrandizement of Russia; but Napoleon III. hastened to ally himself with England in demanding a guarantee from Russia of the integrity of the Turkish possessions. Sardinia, under Victor Emmanuel, joined in the war which followed, and the alliance was productive of important results. It placed Napoleon III. in intimate relations with the English crown, and won for him unquestionable popularity with the English people. It elevated Sardinia from an obscure to a conspicuous position in European politics, and gave to Victor Emmanuel that confidential relationship which afterwards led to an alliance against Austria. And the war, successful in maintaining the integrity of Turkey and in ultimately destroying Sebastopol, was closed by the peace of Paris (1856), in which England, France, Prussia, Austria, Sardinia, Russia, and Turkey took part.

Among the articles of this peace, it was stipulated that the Danube should be open to free navigation, Russia relinquishing her control over its mouth, and England relinquishing the insignia of universal maritime supremacy. Blockades, unless actual and effective, were not to be regarded as binding; the rights of neutrals received additional security; and privateering was to be surrendered by all the subscribing powers. To these conclusions all the states of Europe gave in their adhesions. The government of the United States withheld its assent on the ground that the measures for the protection of neutrals were not sufficiently thorough; and afterwards, during the civil war, in vain endeavored, by assenting specially to the provision in respect to privateers, to obtain the benefits of that provision.[1]—The treaty of Paris further provided that, before war was actually commenced, the combatants should invoke the friendly offices of an independent state as a mediator. But that this provision was not regarded by the parties as binding is shown by the great continental wars which followed, no one of which was preceded by attempts at arbitration.[2]

Tendency to absorption of minor states.

§ 134. Another important recent tendency to be noticed is that of the absorption of minor states. At one time it seemed as if the permanent policy of Europe was decentralization. Germany, which had previously been united under an imperial control, was split up into a series of independent states, some of them without appreciable political power. Spain had been stripped of her colonies, and of her Italian and Flemish dependencies. From Turkey Greece had been torn; the ancient union of Denmark and Sweden was dissolved; Portugal was finally severed from Spain; England lost her chief American colonies. The reaction to annexation and territorial aggrandizement was first exhibited in the United States, whose territory was increased by the addition of Louisiana and Florida, to be followed by that of Texas, California, and Alaska. A still more important national aggrandizement flowed from the success of the government in the great civil war, which

[1] See *infra*, § 201.

[2] *Infra*, §§ 216 *et seq.*

terminated in 1864. It is true that this war brought no accession of territory, and that propositions for the annexation of additional territory have since then been repelled. But before the war it was always an open question how far particular states might be entitled, under the constitution, to secede; and this right had been claimed at the Hartford convention as a constitutional safeguard, and was the basis of the revolutionary action of the southern states in 1858. Not only was this claim finally extinguished by the result of the civil war, but the chief element of domestic dissension was removed by the abolition of slavery. Hence, as is stated by Holtzendorff,[1] it was not until after this war and the extinction of the element of discord caused by slavery, that the United States took the position of a leading power. In Europe, also, there has been a marked tendency to consolidation. By the congress of Vienna, in 1815, Venice was attached to Austria, a large portion of Saxony to Prussia, Genoa to Sardinia, and Norway to Sweden; and in each case without consulting the wishes of the population annexed. In 1859 Italy was united in a kingdom under the house of Savoy. By the rapid and thorough victories in 1864 of Prussia in the campaign against Austria, all the minor states of North Germany were absorbed in Prussia; and an imperial system has been since established, of which Bavaria, Saxony, and Würtemberg are members, and Prussia is the head, while the new empire has become a maritime power by the acquisition of seaports to the north. The vast colonial system of England, impaired by the American Revolution, was increased by new conquests in India, while in 1878 Cyprus was acquired, and in 1882 a dominant influence in Egypt. In 1860 France acquired Savoy, and in 1882 took virtual possession of Tunis and Madagascar. In 1877 Russia, in teeth of the lesson of Sebastopol (by which England and France were supposed to have taught her at such enormous cost that she must not interfere with Turkey), proclaimed war on Turkey, and after a victorious campaign obtained, by the treaty of San Stefano, of March 3, 1878, considerable accession of territory. This, however, was reduced by the general pacification effected by the

[1] Op. cit., 1199.

congress of Berlin, in the fall of the same year, England obtaining in that congress the cession of Cyprus. Russia, also, between 1836 and 1880, has been vastly increasing her possessions in Asia. The consequences of these territorial changes are of much interest in connection with the topic before us. In the first place, they diminish the probability of war by diminishing the number of parties by whom war can be begun. In the second place, they make the institution of pacific and liberal reforms more practicable by the diminution of the parties whose assent is required to a change. In the third place, each of these territorial changes has been in defiance of the principle of *jure-divino* legitimacy, and has hence been a ratification, if not of a popular scheme of government, at least of the right to change institutions from time to time as policy requires. And several important ameliorations of the old rules of international law have followed this reconstruction of states. By a convention held in Geneva in 1864 rules were adopted for the better treatment of wounded prisoners. In 1866 Prussia, Italy, and Austria united in urging the adoption of the rule proposed by the United States, that private property should not be the subject of capture at sea; and though this was not accepted by France or England, its general recognition may be regarded as only a question of time.[1] The abolition of slavery in the United States and in Russia removes any doubt from the question whether slavery is an offence by the law of nations. The increase of railroads, with tunnels, by which even the barriers of the Alps have been removed; the establishment of telegraphs, by which instantaneous communication can be had with all civilized states in Europe and America, have done much to unite these states in a community of interests, which make war the more unlikely, by making it the more distressing and the more destructive.

III. Independent Sovereignty, its Inviolability and Incidents.

§ 135. The independent sovereignty of states is the basis of public international law, just as equality in the distribution of rights is the basis of municipal law. As far as concerns muni-

[1] *Infra*, §§ 216 *et seq.*

cipal law, in its proper sense, all individuals have the same rights; so far as concerns public international law in its proper sense, all nations have the same rights, the weak being entitled to the same respect as the strong, the small as the great. Important public interests are subserved by this equalization of states in the eye of the law. If, in order to obtain the rights of independence, size and strength were necessary, then small and weak states would cease to exist. Yet such states have a peculiar value in the system of the world. They supply to nationalities distinctive institutions of which they would otherwise be deprived. They are non-conductors intervening between great states and intercepting collisions which would otherwise be of constant occurrence. If we do not admit such inviolable independent sovereignty we pave the way for a centralized universal government which would be destructive of all free civilization.[1]

Independent sovereignty of states essential to civilization.

§ 136. A state to be thus independent must be a specific territory inhabited by a nation permanently subject, so far as foreign relations are concerned, to a com-

Specific territory essential

[1] The equality of independent states is a theory generally accepted by writers on international law, especially by those who belong, as do some of the most eminent, to states not of the first rank for size or population; *e. g.*, Belgium and Italy. It is also defended by Wheaton, Histoire des progrés au droit des gens, Première période, § 2. It is disputed by Prof. Lorimer (Law of Nations, i. 182 *et seq.*), who argues that at the best it can only be regarded as a vague generality. In point of fact, states of great power and wealth necessarily obtain a great ascendency over weaker and poorer states. European affairs, for instance, are settled by the "five powers:" maritime affairs by maritime nations. See Nys, Le Droit de la Guerre, 101 *et seq.*

The question in the text is not to be confounded with that of sovereignty as determining domicil. In the United States there are as many distinct domicils as there are States. In Germany this is the case with Oldenburg; and the same distinction applies to Austria and Hungary as to the several states composing the German empire, to the Confederated cantons of Switzerland, and to the United Republics of Central and South America. See *infra*, § 254.

It is no little credit to England that, however little inclined her leading statesmen were to respect the rights of neutrals in the great struggle with Napoleon, her courts were in the main true to that leading principle of international law which asserts the equal independent rights of sovereign states. This was eminently the case with Lord Stowell, who during that great conflict presided in the English admiralty.

but not form of govern-ment.

mon government whose authority is coextensive with the territory. The political character of the government is immaterial. It may be an absolute monarchy, or an oligarchy, or a republic; it may be a federative or a closely consolidated state; all that is requisite is that there should be a settled government, coextensive with the territory governed, capable of entering into binding relations with foreign powers. Size, power, religious type, have nothing to do with the question of international rights. "The smallest republic is as much a sovereign state as is the most powerful empire."[1] The test is capacity to bind the nation occupying the territory under consideration. On this ground Lord Stowell held that the governments of the North African states, in existence in his day, were to be regarded as competent, for the time being, to execute valid treaties, though their notions of international law were in some important respects different from those obtaining on the continent of Europe.[2] It makes no difference internationally in what way the functions of a government may have been distributed, if it has the exclusive power of dealing with foreign nations. For instance, Austria and Hungary may be in many respects distinct and sovereign states, and the states of the American Union are each in some respects sovereign, yet this in no respect affects the fact that the court of Vienna is the only international organ of Austria and Hungary, and the Federal government at Washington is the only international organ of the United States.

Modes of sovereignty

§ 137. To make a state a member of the family of nations so as to constitute it one of the factors by which international law is determined, it must be sovereign. In this connection the following distinctions have been taken.

(1) *Half-sovereign states*, as they have been called, are vassal states whose suzerainty is vested in a superior power. Mr. Wheaton places under this category the North American Indian tribes, to whom, by the supreme court, the *status* of *quasi*

[1] Vattel, Prelim., s. 18; Marshall, C. J., The Antelope, 10 Wheat. 66.

[2] The Helena, 4 Rob. Ad. 3.

sovereignty has been assigned; and while the United States government has not hesitated to wage war on and make treaties with those tribes, it would not tolerate any attempt on their part to make treaties with foreign states. As European illustrations of half-sovereign states, may be mentioned Monaco, which is under the protection of Sardinia; Marino, which is under papal protection; Transvaal, which is under the protection of England; and Tunis, which, since 1881, is under the protection of France. Whether Bulgaria and Egypt fall under this head are questions still open. And whether there is such a distinctive group as "half-sovereign" states has been doubted with good reason.[1] No matter what powers such a vassal state may hold in reference to its suzerain, if it has no power of dealing with foreign states, it is not, according to international law, a member of the family of nations.

(2) *Confederacy of states* (*Staaten-bund*). The states which are members of confederacies of this class reserve the right to negotiate in public affairs with foreign powers, and are bound to their associates only by treaty to performance of specific objects which are not inconsistent with the maintenance of their sovereignty so far as concerns their relation to foreign powers. As a *Staaten-bund* are to be regarded the members of the German empire.

(3) *A confederated state* (*Bundestaat*), on the other hand, absorbs the entire sovereignty of its members, so far as concerns their relations to foreign powers. They may retain their sovereignty for many domestic purposes; they may be sovereigns in relation to each other as to many important particulars; but, as members of the family of nations, they have ceased to exist. Under this head are to be classed the United States of America and the Swiss confederacy.

(4) *A union of sovereignties*, as is the case with Norway and Sweden, and with Great Britain, which contains the sovereignties of England, Ireland, and Scotland, united under a common absolute legislature and sovereign.

[1] Stubbs, Suzerainty, or the rights and duties of suzerain and vassal states, London, 1882; see Holtzendorff, *ut supra*, 1207; Jellinek, Die Lehre von den Staatenverbindungen, 1882.

(5) *A personal union*, in which certain sovereignties are temporarily united under a common prince. This was the case with the union of Great Britain with Hanover, during the reigns of the first four Hanover kings; and with the union of the empire with Flanders and Spain under Charles V., and of Castile and Arragon under Ferdinand and Isabella. At present, the same relations exist between Luxemburg and Holland. Under such a union the function of declaring the political relations of the united countries is with the common prince. It should be observed that the mode in which a state expresses itself diplomatically has nothing to do with the question of its reception as a sovereign power. It may act through committees appointed by legislative bodies, as was the case with Holland; or through embassies appointed by the president and senate, as is the case with the United States; or, as in England, by an embassy appointed by the sovereign nominally, but virtually by the prime minister, who depends for his appointment on the action of the house of commons. These questions are not material. The only question to be determined is whether the functionary speaking for the state is actually entitled so to speak.[1]

Sovereignties entitled to political deference.

§ 138. It is a part of the law of nations that a sovereign state is entitled to deference as such by other sovereignties. This deference is shown in various ways:—

1. To the chief magistrate and chief officials of a nation. It was on this ground that General Washington treated it as an indignity for the French ambassador in the United States to address an appeal to the people of the United States. The only person whom an ambassador is to address is the sovereign to whom he is accredited. And to him all due marks of respect should be paid.[2]

[1] *Infra*, §§ 158, 505. The question of form of government, it will be gathered from what has been said, has nothing to do with that of sovereignty. Every nation has a right to choose the form of government it considers best adapted to its condition. Hartmann, § 8.

[2] In England prosecutions for libeling and inviting the assassination of foreign sovereigns have been sustained. See Phill., ii. 48 (3d ed.); R. *v.* Peltier, 28 St. Tr. 530; R. *v.* Most, L. R. 7 Q. B. D. 244.

2. To the insignia and marks of the sovereignty of the state. An insult to these is an insult to the sovereign.[1]

3. To the relationship of sovereign to subject. The interference of one state in the affairs of another is a breach of international law.

4. To inviolability of soil. No nation has a right to intrude on the soil of another, unless when necessary for self-defence.[2]

This inviolability precludes the passage of an armed force of another sovereign through the territories of an independent sovereign; and for a neutral sovereign to give the right of passage over his soil to the armed force of a belligerent is a gross breach of neutrality.[3] But permission to a sovereign, not a belligerent, to take his troops over an independent state is sometimes given as a matter of courtesy.[4]

§ 139. A sovereign is entitled, also, to demand from a foreign state an indemnity for any wrong which his subjects may have suffered from such state.[5] Before, however, a claim of this class can be pressed, the subject must have been refused relief by the authorities of the state offending. All reasonable efforts on his part to obtain such relief must be exhausted, before his sovereign is justified in interposing in his behalf. Nor can he rightfully ask his own sovereign to redress wrongs inflicted on him which were incidental to the peculiar system of the country which he selected as his residence. He should have acquainted

And to protection of subjects.

[1] Insults to the flag have been regarded as grounds for withdrawal of an embassy, and where no apology is given, may be cause for war. The refusal of maritime ceremonials, when established by custom, may lead to grave difficulties. They cannot be exacted, however, except within cannon shot of the shore of the sovereign to whom such ceremonial is due. They consist in lowering the flag and saluting ships of war, forts, fortifications, and foreign sovereigns, in their territorial waters. All other ceremonials are matters of courtesy.

[2] *Infra*, §§ 146, 239, 248. As to territorial waters, see *infra*, §§ 189 and 240.

[3] *Infra*, § 248.

[4] Mr. Seward, in 1861, offered the British government permission to transport British troops across the state of Maine, Quebec being then blockaded by ice. This, however, was excepted to by the state of Maine, and the British government did not avail itself of the offer. A correspondence on the same topic will be found in Hamilton's Works, vol. iv. p. 48.

[5] See Fleeger *v.* Pool, 1 McLean, 185; 11 Pet. 185.

himself with that system before he put himself under its power. It is only for flagrant wrongs, not part of such system, and for which the country inflicting will give no satisfaction, that he can call on his own sovereign to exact redress. That a military servant of a belligerent is responsible only to his own sovereign will be hereafter seen.[1]

Recognition dependent on discretion.

§ 140. The recognition of a state as independent is not necessary to constitute its independence, nor is its independence constituted by such recognition. It must be recollected that independent sovereignty may come about in several ways. A desert country may be occupied by settlers, no prior civilized state having existed on the same soil. A colony or a component part of a parent state may revolt. Several small states may unite to form a large state. But whatever may be the way in which the new state may be formed, its recognition depends upon the discretion of the recognizing state. This recognition may be in several ways. It may be by formally receiving ambassadors from the state seeking recognition; it may be by treaty; though it is not regarded as granted by a license to subjects to trade with subjects of the state seeking recognition. But whatever may be the mode of recognition, it is dependent on the discretion of the state by whom it is made. In some cases—*e. g.*, the recognition by France of the United States, and the recognition of the South American republics by England—it may be made promptly to further a particular political end; in other cases it may, in the same view, be long delayed. But in any view it is a matter of grace, to be granted at discretion.[2] Recognition of an insurgent government as an independent sovereign is not intervention, and is not by itself cause of war; nor, *à fortiori*, as will be presently seen, is the recognition of such insurgent as a belligerent. The rule generally adopted is, that a government *de facto* may be acknowledged by other states as soon as such government has the power and the in-

[1] *Infra*, § 210.

[2] See on this topic Holtzendorff, *ut sup.* 1208; citing Spence on recognition of Southern Confederacy, 3d ed., 1862; Gibbs, Recognition, 1863; Mancini, Della nazionalità come fundamento del diretto delle genti, 1851; Esperson, Il principio di nazionalità, 1868; Cagodan, La Nationalité, 1879.

vention to maintain its independence and to fulfil its international obligations. A *de facto* government so established stands on the same footing as a legitimate government.[1]

§ 141. Recognition of an insurgent government as a belligerent is to be distinguished from a recognition of such government as an independent power. The latter recognition may be deferred until the contest between the insurgents and the parent state is practically over; the former recognition is given usually when the insurgents have a permanent and efficient military organization, and always when the insurgents are recognized as belligerents by the parent state.[2] The last condition, however, is not necessary in cases where the insurrection assumes the position of a civil war, and when the usual conditions of a civil war exist. During the late civil war in the United States, the facts that the Federal government had blockaded the southern ports, and had agreed to an interchange of prisoners with the southern authorities, were held by the English and French governments to be grounds, in connection with the magnitude of the contest, on which the recognition of the belligerent rights of the southern government might be placed. This was regarded by the Federal government as precipitate and partial, though it was at the same time stated that this recognition released the Federal government from liability for damages done by the insurgents to British interests. But the belligerency of the southern forces was virtually acknowledged by the Federal government, which subsequently withdrew the prosecutions instituted for treason and piracy which had been instituted against those concerned in the insurrection.[3]

Belligerency may be distinctively recognized.

[1] That in the United States questions of recognition are determined by the executive and legislative departments of the government, see U. S. *v.* Palmer, 3 Wheat. 610; The Divina Pastora, 4 Wheat. 52.

[2] That a belligerent may be represented by diplomatic agents, see *infra*, § 165. This question was involved in the Trent case, and the general sense of European jurists was as stated in the text. See *infra*, § 228.

[3] "By recognizing belligerent rights, neutral powers pronounce no judgment whatever either on the merits of the claim or the probability of its ultimate vindication. Belligerent recognition is a mere declaration of impartiality."—Lorimer's Law of Nations, i. 142.

The rule is thus stated by Mr. Field in his International Code:—

"§ 707. A nation in which an insurrection exists may, without renouncing its claims of jurisdiction over the in-

§ 142. When a section of a state revolts and becomes independent, it cannot be internationally charged with the obliga-

surgents, or recognizing them as alien enemies or as having an established government, treat them as belligerents, and claim from foreign nations the performance of neutral duties.

"This allows the nation at its option to invoke the principle that a civil war creates the same belligerent rights against neutrals, as a war between two separate and independent powers. Prize Cases, 2 Black's U. S. Supr. Ct. Rep. 635. And see The Mary Clinton, Blatchford's Prize Cases (U. S. Dist. Ct.), p. 556.

"Whether rebels cruising on the high seas against the property of the parent state can, in any case, be considered as pirates, see Dana's Wheaton, § 124, p. 196, note 84.

"§ 708. When an insurrection exists in a nation, and the insurgents have an established government capable of maintaining relations with other nations, any other nation may recognize them as belligerents, without recognizing their independence, and may assume a position of neutrality."

As to recognition of Confederate belligerency see *infra*, §§ 165, 217–228.

"To the Confederate government was conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged, under the law of nations, to the armies of independent governments engaged in war against each other. The Confederate states were belligerents in the sense attached to that word by the law of nations."—Harlan, J., Ford *v.* Surget, 97 U. S. 594.

As to recognition by the United States of the belligerency of foreign insurg ents, see The Divina Pastora, 4 Wheat. 52; The Neustra Senora, ibid. 497. That this applies to the question of the recognition of a state government by the Federal government, see Luther *v.* Borden, 7 Howard, 1.

Dr. Woolsey (Int. Law, App. iii., note 19) says, in respect to the English recognition of Confederate belligerency:—

"There may be a difficulty in ascertaining when the fact of war begins, and this difficulty is the greater in cases of insurrection or revolt, where many of the antecedents and premonitory tokens of war are wanting, where an insurrection may be of little account and easily suppressed, and where war bursts out full-blown, it may be, at once. Our government has more than once professed to govern its action by the following criteria expressed in Mr. Monroe's words relating to the Spanish South American revolts: 'As soon as the movement assumes such a steady and consistent form as to make the success of the provinces probable, the rights to which they were entitled by the law of nations, as equal parties to a civil war, have been extended to them.' But this rule breaks down in several places. The probability is a creature of the mind, something merely subjective, and ought not to enter into a definition of what a nation ought to do. Again, the success does not depend on steadiness and consistency of form only, but on relative strength of the parties. If you make probability of success the criterion of right in the case, you have to weigh other circumstances before being able to judge which is most probable, success or defeat. Would you, if you conceded belligerent rights, withdraw the concession whenever success ceased to be probable? And, still further, such

tions of the parent state. By treaty between the two, it is true, a public debt may be apportioned; but, apart from

provinces in revolt are not entitled by the law of nations to *rights* as equal parties to a civil war. They have properly no rights, and the concession of belligerency is not made on their account, but on account of considerations of policy on the part of the state itself which declares them such, or on grounds of humanity.

"Precedents are to be drawn chiefly from modern times. The revolt of the low countries was hardly an analogous case, for they were states having their especial charters, not connected with Spain, except so far as the king of Spain was their suzerain. In our revolutionary war, precedent was not all on one side. Great Britain stoutly declared Paul Jones to be a pirate, because he was a British subject under commission from revolting colonies, and Denmark agreed to this. In the South American revolutions, the concessions of belligerent rights were given freely by neutrals, most freely by the United States; and, as for proclamations, our government went so far as to issue one, in 1838, 'for the prevention of unlawful interference in the civil war in Canada,' where no civil or military organization had been set up. The true time for issuing such a declaration, if it is best to issue it at all, is when a revolt has its organized government prepared by law for war on either element or on both, and when some act, involving the open intention and the fact of war, has been performed by one or both of the parties. Here are two facts, the one political, the other pertaining to the acts of a political body. The fact of war is either a declaration of war or some other implying it, like a proclamation of blockade, or, it may be, actual armed contest.

"Was there, then, a state of war when the British proclamation of neutrality was given to the world, or did the facts of the case justify the British government in the supposition that such a state of war existed? Here everything depends on facts and on opinions derived from facts. We find opinions expressed by eminent men among ourselves in the first half of May, 1861, that war had already begun, which some of them conceived of as beginning with the attack on Fort Sumter. We find a number of states seceding from the Union, whose territory made a continuous whole, which formed a constitution, and chose public officers, a president among the rest. This president made a proclamation touching letters of marque and reprisal, and told his congress that two vessels had been purchased for naval warfare. We find next two proclamations of the president of the United States, one of April 15th, calling for a large force of the militia of the states, and another of April 19th, after the proclamation of the Confederate president inviting letters of marque and reprisal had become known at Washington, announcing an intention to set on foot a blockade. On the 6th of May, the southern congress sanctioned the proclamation concerning letters of marque, recognized a state of war, and legislated on cruisers and capture. We pass over many acts of violence, such as seizures of forts and other public property within the Confederate states. Intelligence of President Lincoln's blockade reached London on the evening of May 2d. Copies of it were

treaty, the parent state alone can be called upon to perform obligations it has incurred. The treaties of the old state, also, do not bind the new state. When, however, there is a union of several states under a common head, then the aggregate state is bound by the obligations of its several members, and by their treaties, as far as consistent. The rule that a revolting and seceding state is not bound by the obligations of the parent state has been held not to apply to cases in which the obligation was especially incurred on the responsibility or for the benefit of the revolting or seceding state. And "if a nation be divided into

Devolution of duties on states seceding.

there received between the 5th of May and the 11th. On the 13th the queen's proclamation of neutrality was issued.

"The president's proclamation of blockade announced a measure which might have important international consequences. It was, in fact, a declaration of a state of war on the sea. 'He deemed it advisable,' he says, 'to set on foot a blockade, in pursuance of the laws of the United States and of the laws of nations.' And vessels exposing themselves to penalty for violating the blockade would be 'captured and sent to the nearest convenient port for such proceeding against them and their cargoes, as prize, as might be deemed advisable.' Several neutral vessels were captured between April 19 and July 13, on which last day Congress sanctioned the proceedings of the government. The validity of the captures came before the supreme court, and the question when the war began became a very important one. The court decided that the president had a right, *jure belli*, to institute a blockade of ports in the possession of the rebellious states, and that blockade was an act of war.

"It would seem, then, that, if the British government erred in thinking that the war began as early as Mr. Lincoln's proclamation in question, they erred in company with our supreme court. (See the 'Alabama Question,' New Englander for July, 1869; Black's Reports, ii. 635 *et seq.*; Dana on Wheaton, 374–375; Lawrence's Wheaton, 2d ed. supplem., p. 13; and Pomeroy's Introd. to Constit. Law, §§ 447–453.)"

The question of recognition of belligerent insurgents came up in 1850 between the United States and Austria under the following circumstances: Hungary was then in revolt, and the United States authorized a secret agent to proceed to Europe to inquire as to the probability of Hungary securing its independence. In the report of this agent, which was laid before congress, the rule of Austria was spoken of as "iron." The Austrian government, through its chargé d'affaires at Washington, Mr. Hülseman, protested against this interference. The action of the United States government was vindicated by Mr. Webster, who insisted (1) that there had been no actual recognition of the insurgents, though sympathy with them was unavoidable; (2) that the correspondence between different departments of a government was not open to foreign diplomatic criticism.

various distinct societies, the obligations which have accrued to the whole, before the division, are, unless they have been the subject of a special agreement, ratably binding on the different parts "[1]

§ 143. A state, also, does not lose its individuality and its consequent international liability by submitting to the loss of a portion of its territory, nor by undergoing a revolution by which its political institutions are radically changed. By such revolution the treaties and other engagements made by it at earlier periods are not vacated.[2]

Indivdуality of parent state remains.

"A nation is not an idea only of local extent and individual momentary aggregation, but it is an idea of continuity which extends in time as well as in members and in space."[3] "A state neither loses any of its rights, nor is discharged from any of its duties, by a change in the form of its civil government. The body politic is the same, though it may have a different organ of communication."[4]

The following rules may therefore be accepted:—

1. Cession of a province does not affect the identity or continuous sovereignty of the parent state.

2. The ceded fraction is no longer affected by the treaties or obligations of the parent state, though it is affected by local burdens imposed on it, as well as by its prior international limits.[5]

3. The same distinctions exist as to revolted colonies.

§ 144. A state cannot evade liability for the action of its duly constituted executives on the ground that this action did not meet with its approval. It is true that serious questions may arise as to whether a particular ambassador was duly authorized to act. Such questions arose constantly at the beginning of the French

Mutual responsibility of states and governments.

[1] Phillimore, op. cit., i. 211. To the same effect is Kent's Com., i. 26.

[2] Thus each of the "reconstructed" states, after the late civil war in this country, has been held to be the same continuous body as "seceded," and as existed prior to "secession." Keith v. Clark, 97 U. S. 454; see *infra*, § 593.

[3] Burke, Reform of Represen. in House of Commons. The same view is maintained by Hooker, Ec. Pol., Book I.; *supra*, § 86.

[4] Kent's Com., i. 25.

[5] Hartmann, § 13; Wildman, i. 173.

Revolution; and they are not infrequent under our own system, in which a treaty to be binding must be ratified by two-thirds of the senate.[1] But when an act duly emanates from an officer authorized by the state to perform it, it cannot be afterwards repudiated on the ground that it was not in conformity with the views of the people. So, on the other hand, the government of a state has to bear the responsibility, so far as concerns foreign powers, of depredations committed by its subjects.[2]

Governments *de facto* authoritative.

§ 145. Whatever may be thought by the sovereigns taking part in the Vienna Congress, there is no longer any doubt that an established *de facto* government must be recognized abroad as binding the state it represents. There is no existing state, in fact, in which the principle of dynastic legitimacy can be shown to have been permanently maintained. Nor can one state be permitted to inquire whether the constitution of another state has been lawfully adopted, or whether its sovereign has been duly elected. The constitution or sovereign at the time in force must be recognized, not only as duly authorized, but as succeeding to the obligations of its predecessor. And this rule has been applied to acts done in obedience to the *de facto* governments of the insurgent states during our late civil war.[3]

Territory inviolable, but qualification as to self-defence.

§ 146. The international right of transit, by which subjects of one state (with such conditions as to passport as the visited state may prescribe) may visit and travel in all other civilized states, is limited to pacific visits. A state may exclude foreigners whose presence it

[1] *Infra*, §§ 158, 502.

[2] Whart. Crim. Law, 8th ed., §§ 94, 283, 310; *infra*, §§ 178, 210. That a subject of an enemy is to be regarded as an enemy, see *infra*, § 214.

That redress for a wrong done by a foreign sovereign to a citizen may be sought through such citizen's own government, see Fleeger v. Pool, 1 McL. 185; S. C., 11 Pet. 185.

[3] Ford v. Surget, 97 U. S. 594.

"The law of nations preserves an entire indifference to constitutions so long as they do not prevent fulfilment of obligations. Every state is in its legitimate." "The question of a state's right to exist is an *internal* one, to be decided by those within its borders who belong to its organization." Woolsey, Int. Law, §§ 39–40.

may regard as prejudicial to its peace;[1] but for a foreign state to forcibly seize persons or property on the territory of a state with which it is at peace, or in any way to interfere in its domestic affairs, is a gross violation of international law.[2] On the other hand, any invasion of a friendly territory by a foreign armed force is forbidden by international law. An important qualification of this rule exists in cases where a brief invasion of friendly foreign territory is made for the purpose of seizing marauders who have made such foreign territory a temporary refuge. This was the justification of the action of the British government in 1838 in the seizure and destruction of the Caroline when in a port of the state of New York,[3] and the same plea was set up more recently by the United States when it was necessary to pursue and seize on Mexican territory bandits, who, after plundering the Texas border, fled into Mexico. The arrest of the Duke of Enghien, when in a country at peace with France, by the order of Napoleon, would have been justifiable on the same ground, had a case of necessity been made out. But there was no such necessity, since there was no immediate danger to France from the Duke of Enghien's presence in his place of refuge, and on requisition from

[1] This was done in England during the contest with France, and the prerogative was claimed by our government during the administration of John Adams, when the "alien" act was passed. On the same principle rest the treaties and statutes, excluding Chinese, *infra*, §§ 264, 435.

[2] The independence of small states can be only in this way vindicated. "No particular nation," so speaks Hooker, "can lawfully prejudice the same (the law of nations) by their several laws and ordinances, more than a man by his private resolutions the law of the commonwealth or state wherein he liveth; for as civil law, being the act of the whole body politic, doth therefore overrule each several parts of the same body, so there is no reason that any one commonwealth of itself should, to the prejudice of another, annihilate that whereon the whole world hath agreed." Hooker, Ecc. Pol., i. § 10. It is on this principle that the civilians consulted by the allies based their right to combine and prevent the conquest of the Netherlands by France. As to intervention, see *infra*, § 174.

[3] See discussion in Whart. Cr. Law, 8th ed., §§ 283, 943; *cf.* Phill., op. cit., i. 313; Vattel, lib. iii., c. vii. § 132; The Virginius Case, pamph., cited Whart. Crim. Law, § 487*a*; Hall's Int. Law, 233. For a notice of the question, how far the United States would have been justified in pursuing and arresting Canada marauders in Canada, see 2 Dix's Life, pp. 110 *et seq.*

France he would have been compelled to seek another asylum.[1]

It is also to be observed that a sovereign who is cognizant of the fact that his territory is made the base of hostile operations against a state with which he is at peace, and takes no measures to check such operations, is guilty of a gross breach of international law.[2] Such connivance will justify war being declared against him, if he were strong enough to have prevented the wrong; or, if he were not strong enough to have prevented it, will justify entrance into his territory for the purpose of arresting the offenders and destroying their engines of mischief. If the wrong has been consummated, then the sovereign, to whose negligence or incapacity the non-suppression of the offensive operations is due, is liable internationally for the damage inflicted.[3]

Exception as to semi-civilized or barbarous states.

§ 147. An exception to the rule just stated is recognized as to barbarous or imperfectly civilized states. Even in states such as Turkey, Egypt, and China, consular or mixed courts are established for the trial of cases in which Europeans or citizens of the United States are concerned. In barbarous states, if justice is to be administered at all, so far as concerns civilized foreigners visiting such states, it must be by such tribunals.[4] The jurisdiction

[1] That for one state to send an armed force through the territory of another is a violation of the law of nations, see *supra*, § 138; and see *infra*, §§ 179, 239, 248. See Davison *v.* Sealskins, 2 Paine, 324.

[2] *Infra*, §§ 241 *et seq.*

[3] See discussion of Alabama Case in Whart. Crim. L., 8th ed., §§ 1902 *et seq.*; *infra*, §§ 243 *et seq.*

[4] A detailed statement of the courts in question is given in Phill., op. cit., i. p. 463 *et seq.*; see, also, 7 Opin. Atty.-Gen., 342, 495; 8 Opin. Atty.-Gen., 380. As to consuls in such states, see *infra*, § 170. On the subject of the execution on board the Beagle, a British ship, of a South Sea Islander in 1878, see Saturday Review, August 10, 1878, where the debate in the house of commons on this point is noticed.

In the U. S. Consular Regulations (ed. of 1881) the law as to consuls is thus declared: "In Mahometan and semi-civilized countries the rights of extra-territoriality have been largely preserved, and have been generally confirmed by treaties to consular officers. To a degree they enjoy the immunities of diplomatic representatives, besides certain prerogatives of jurisdiction, together with the right of worship, and, to some extent, the right of asylum," § 80. These immunities extend to an exemption from both the civil and criminal jurisdiction of the country to which they are sent, and protect their household and the effects covered by

is founded not so much on treaty as on tacit consent. Civilized powers will not surrender the control of the business relations or of the persons of their subjects to the sovereigns of uncivilized or semi-civilized states. On the other hand, the sovereigns of uncivilized or semi-civilized states do not generally desire to take control of the business relations or even the persons of the subjects of civilized states. This is eminently the case with the relations of the Turk and the Christian. The Turk is as averse to tainting himself by mixing up in the affairs of *giaours*, as the *giaours* are to be governed by the Turk. All that the treaties, for instance with Musselman powers, determine in this connection is, that the Musselman's sovereign does not desire to interfere in the affairs of foreigners; leaving it to the sovereigns to whom such foreigners are subject to settle among themselves how such affairs are to be determined.[1]

Right to trade secured by law of nations.

§ 148. The right to trade is secured to each state by the law of nations. It is true that one state may suspend business intercourse by embargo with another state, as was done by the United States with England, prior to the war of 1812. It is true, also, that a state may compel its colonies to trade only with itself, and that the particular products of a state may be inhibited by other states, as is the case with opium, and that duties which

the consular residence. Their personal property is exempt from taxation, though it may be otherwise with real estate or movables not connected with the consulate. Generally, they are exempt from all personal impositions that arise from the character of a subject or citizen of the country," § 81. "The consular jurisdiction in these countries is both civil and criminal, and has in most cases been provided for by the stipulations of treaties. The extent of its exercise, as well as the penalties and punishments to be enforced, depend generally upon the laws of his own country to the exclusion of the jurisdiction of all local tribunals." See Lawrence's Wheaton, 73, 74, notes. The question, on its criminal side, is discussed in Whart. Cr. Law, 8th ed., § 273; and see Stupp, *In re*, 11 Blatch. 124.

Such jurisdiction, however, is limited to barbarous or semi-civilized states. The William Harris, Ware, 367. Nor, in England, will a foreign consul be regarded as entitled as such to administer the estate of a domiciled subject of the country which such consul represents.

[1] Some valuable papers on the topic in the text will be found in the Annuaire of the Institute of International Law for 1883, pp. 223 *et seq.*

are virtually prohibitive may be laid on the competing products of other states.[1] But, as a rule, each state has a right, subject to such drawbacks as it may impose, to send its products to other lands, and receive their products in exchange. No state can be permitted to fully isolate itself from the rest of the world. These rules are now recognized by all civilized states, though they have been only partially accepted in the East. It was not till the treaty of Nanking, in 1842, that trade between China and England was officially sanctioned by China, and then it was limited to five ports; nor was it until 1873 that ministers from Europe and the United States were diplomatically received in Pekin. Japan remained absolutely closed until 1853, and the first treaty executed by Japan was with the United States on July 29, 1858.

Pledges and servitudes of national property.

§ 149. In the middle ages it was not unusual for a sovereign to pledge or mortgage portions of his property to secure debts or dowries. This right, however, has not been of late years recognized. We are not without modern instances, however, of servitudes or easements in its territory granted by one state to another. Such servitudes, it is true, cannot be enforced, as can similar claims when existing among private individuals; but they are of the nature of treaty duties, to be insisted on as are other treaty duties. As illustrations may be mentioned the navigation of certain rivers or canals; the non-fortification of certain points governing the territory of the other contracting party; the fishing (conceded to the United States and France) on the waters of Newfoundland.[2]

[1] *Infra*, §§ 207, 421.

[2] See on this topic, Hartmann, § 62.

As illustrations of hypothecations may be mentioned that of Ramoken and Vlissingen by the Netherlands to England in 1585, and of Corsica by Genoa to France in 1768.

An instance of servitudes is to be found in those cases in which states are held bound to receive and permit the transit of waters flowing from another state. Phill., op. cit., 389.

As servitudes, also, "may be enumerated agreements that other nations shall have the right of transit over certain rivers or canals; agreements that certain obnoxious persons (*e. g.*, pretenders to a throne) shall not be permitted to reside in an adjacent land; agreements (as in the case of Dunkirk) that certain fortifications should be destroyed; agreements that certain garrisons should be kept in certain places." Phill., op. cit., 391.

§ 150. Instances have been elsewhere noticed of the neutralization of territory by treaty. An interesting illustration of this is to be found in the treaty of April 19, 1850, between Great Britain and the United States, providing for the neutralization of any railway or canal that may be constructed across the isthmus uniting North and South America. A convention of August 27, 1856, between the same powers, guaranteed the neutrality of the then proposed Honduras Interoceanic Railway.[1] The neutrality of the Suez Canal, also, has been agreed to by all the parties concerned; and the neutrality of Luxemburg was guaranteed at a conference on May 11, 1866, between the leading European states, Luxemburg being required to destroy its fortifications and maintain a neutral attitude to all other states.

Servitude implied in neutralization.

IV. Acquisitions of Territory.

§ 151. The modes of acquiring new territory may be classified as follows:—

Modes of acquiring.

(1) By conquest, *e.g.*, the partitions of Poland; the absorption of Silesia by Prussia; the conquest of Italy by Sardinia, of Alsace by France, of California by the United States.

(2) By occupation, as was the case with America and Australia.

(3) By accession (accretion), as where the soil of a state is increased by deposits from the waters by which it is bounded.

(4) By annexation through treaty or otherwise, as was the case with the annexation of Savoy by France, and of Louisiana, Florida, Texas, and Alaska by the United States.

Whether a territory can be transferred from one sovereign to another, without the assent of the population of the territory transferred, has been much discussed. It has been maintained that such assent is necessary; but such has not been the practice. No such vote was taken on the cession of Florida, Louisiana, or Alaska to the United States; on the cessions involved in the treaties which determined the north-

[1] Lawrence's Wheat., i. 478; Phill., op. cit., i. 309 *et seq.*

east and the northwest boundaries between the United States and England; on the cessions made in the Vienna Congress in the treaty between Prussia and France in 1871, and in that between Russia, Turkey, and other powers, in 1878. That the supreme power of the state, duly authorized to make treaties, can, without the consent of the ceded population, make such a transfer, is no longer questioned even in the United States.[1] And in any case, whatever may be the right view with regard to territories with a settled population capable of acting intelligently in respect to such cession, consent cannot be necessary when there is no such population to be consulted. No one, for instance, would attempt to impeach the cessions of Louisiana, of Florida, of California, and of Alaska to the United States, on the ground that the consent of the inhabitants of the ceded territory was not obtained.[2]

§ 152. As between two conflicting sovereigns land formed by accession belongs to the adjacent territory, and this is

[1] *Supra*, § 134; see Phill., op. cit., i. 372, where the annexation of Norway to Sweden in 1814 is censured.

[2] According to Grotius, the modes of acquisition of territory are as follows:—

(1) *Occupatione derelicti*, or occupation of desert or savage land, and accession.

(2) *Pactionibus*, or treaty.

(3) *Victoriae jure*, or conquest.

To constitute title by occupation based on discovery, the occupation must be (*a*) authorized by the state claiming to benefit by it, and (*b*) must be permanent. When a settlement is thus made, it gives title to all the territory necessary for the due enjoyment and protection of the settlement. Thus, supposing there are no conflicting claims based on prior permanent occupancy, a permanent settlement of unoccupied land at the mouth of a river gives title to all the territory which that river and its tributaries wash. Supposing there is a conflicting occupancy, then a line equidistant from both settlements should be taken as the boundary between the two. (See Phill., op. cit., 341; Johnson *v.* Mackintosh, 8 Wheat. 543.)

According to Mr. Field (International Code, § 38), territory can be acquired by occupation in the following cases only:—

"1. When it was previously unoccupied by any other than a savage nation;

"2. When the nation which previously occupied it has, without ceding it, renounced the sovereignty which it exercised over it, either expressly, or by abandoning the territory; or,

"3. When the inhabitants of the territory overthrow their government and freely join themselves to the occupying nation."

The question as to whether the title of the settlers of this country is by discovery or conquest is noticed, *supra*, § 64.

the case with regard to the accession of soil on the of ocean or river, and the emerging of islands ; distance from the shore.[1] When a river di- :wo states, the following rules, based on the ıinations of the Roman law in questions of allu- ıay be accepted:—

Land formed by accession belongs to adjacent territory.

Vhen a river channel is left dry, the channel is to be l between the states holding title to the banks.

. division on the same principle is to be made of islands ng in the middle of a river.

ut if not in the middle, then the island belongs to the olding title to the nearest bank.[2]

3. That prescription, and that for a comparatively short , may give title to a *de facto* government there no question. Louis Napoleon was recognized eror in England almost immediately after the *état;* and the German government, after the conclusion war of 1870, treated, as permanently established, the rench administration that was able to make a treaty would be likely to bind. Much more difficult are the ons which may arise when a particular territory is in dis- etween two sovereigns, and when one sets up prescrip- The great preponderance of opinion is to the effect that ndisturbed possession by a sovereign of a particular f territory gives him a strong *prima facie* claim to such

Prescription may give title.

Anna, 5 Rob. Ad. 332; Blunt- 295. See as to distinctive this country, *supra*, §§ 22

Phil., op. cit., 342 *et seq.*

. Field's International Code nctions are thus put:—

. When land is formed on the om artificial causes or by per- degrees, the boundary between ining nations is not changed

. If a considerable and distin- le part of the shore is carried r the water, to a place within ndaries of another nation, the nation owning it while attached to the shore may reclaim it within one year, if it can be restored to the territory of the nation so claiming it; but until it is so restored it must be deemed to be part of the territory within which it is situated.

"§ 45. An island, formed from natural causes in any water other than the sea, belongs to the nation within whose boundary it is formed; or, if it is formed upon the boundary of two or more nations, each nation owns so much of the island as lies within its original boundary."

territory. "The general consent of mankind," says Mr. Wheaton, "has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. Whether this general consent be considered as an implied contract or as positive law, all nations are equally bound by it, since all are parties to it; since none can safely disregard it without impugning its own title to its possessions, and since it is founded on general utility, and tends to promote the general welfare of mankind."[1]

Cession does not divest old laws.

§ 154. The mere cession of a territory by one sovereign to another does not, until otherwise ordained, unseat the old laws of the ceded territory.[2] When territory is ceded by treaty, rights of property under it are not determined until there has been ratification.[3] And until possession is taken under a cession, the prior authorities retain police functions, though technically sovereignty ceases when the cession is complete.[4] And full sovereignty does not pass until delivery.[5] After delivery the relations of the inhabitants of the ceded territory to their former sovereigns are dissolved, but not their relations to each other.[6] Titles to property are not affected by the cession.[7]

[1] Wheaton, i. c. 114, § 5, adopted by Phillimore, op. cit., 365. Sir R. Phillimore also cites a striking passage from Burke's Reflections on the French Revolution, where Burke declares prescription to be "the soundest, the most general, the most recognized title between man and man that is known in municipal or in public jurisprudence; a title in which not arbitrary institutions, but the eternal order of things gives judgment; a title which is not the creature, but the master of positive law; a title which, though not fixed in its term, is rooted in its principles in the law of nature itself, and is, indeed, the original ground of all known property; for all property in soil will always be traced back to that source, and will rest there."

Where, however, a nation which has been conquered by another, throws off the yoke before it has been permanently fastened by prescription, then, by what is called *postliminium*, the nation thus reasserting its independence is entitled to resume its old national place. As to *jus postliminii*, see *infra*, § 223.

[2] See *supra*, § 64; Hall's Int. Law, 78–9.

[3] Haver *v.* Yaker, 9 Wall. 32.

[4] U. S. *v.* Reynes, 9 How. 127; see Calvin's Case, 7 Rep. 17; Strother *v.* Lucas, 12 Pet. 410.

[5] The Fama, 5 Rob. Ad. 97.

[6] Ibid., U. S. *v.* Repentigny, 5 Wall. 211.

[7] Strother *v.* Lucas, 12 Pet. 411; Leitensdorfer *v.* Webb, 20 How. 176.

And mere conquest does not set aside even political institutions and officers until such conquest is ratified by treaty.[1]

V. Treaties.

§ 155. By Grotius treaties are classified as those which are in accordance with natural right and justice, and those which provide for indifferent matters, involving no moral issue. Subsequent authors have spoken of the same distinction as "constitutive," based on rules of right, and "regulative," which establish positive rules concerning matters of policy. Hooker expresses the same distinction by the terms "moral" and "positive." Another distinction is that between "conventions" which are limited to particular persons, or to a particular event, and "treaties," which are permanent arrangements. A distinction is also made between treaties which are strictly bilateral, and treaties which leave it open for other states to come in. In the latter case, if one state violates the treaty, all others coming in may have redress.

Classification of treaties.

So far as concerns their application to international law, treaties may be divided as follows:—

1st. Those which profess to be interpretative of the law of nations, and which are entitled to high respect as showing what in the sense of the parties the law of nations is.

2d. Those which undertake to make new rules for the amendment of the law of nations, as was the case with the treaty of Washington of 1871; which rules, however, are not to be regarded as generally authoritative, unless adopted by all the leading powers, and only bind the consenting parties when it is so expressly and unreservedly agreed.[2]

3d. Those which determine some particular fact in dispute between the nations, and which are of value only as exhibiting the sense of the parties as to a concrete case.[3]

[1] Clark *v.* U. S., 3 Wash. C. C. 104; U. S. *v.* Hayward, 2 Gall. 485.

[2] As to rules proposed in the treaty of Washington, see *infra*, §§ 238, 244 *et seq.*; Whart. Crim. Law, 8th ed., §§ 1904 *et seq.*

[3] See Lorimer's Law of Nations, 43; *infra*, § 159.

§ 156. We have already incidentally noticed treaties by which one state guarantees the performance of a duty by another state.[1] This may be either an obligatory duty, or a duty involving a cession of territory. The guarantor is obliged to use all his force to compel the performance. In many modern treaties to this is added the provision that litigated questions are to be referred to an arbiter.[2]

Guaranty treaties.

§ 157. Treaties, in the main, are subject to the same rules as contracts. These may be specified as follows:—

Treaties as distinguished from contracts.

(1) There must be freedom of action. This does not, in the one case, require that there should be an abstinence from all influence. Neither a contract nor a treaty is abrogated because there was a strong pressure to exact its signature, nor because its signature was a choice of evils. "*Coactus volui*," while it implies a strong pressure, implies also volition. But while contracts, which are coerced by physical force, do not bind it is otherwise with treaties. A treaty is not invalidated by the fact that it is exacted from a conquered state by a victorious general armed with irresistible engines of destruction.[3]

(2) There must be a concurrence of minds to one and the same thing.

(3) The interpretation of obscure terms in a treaty is a matter of fact, as to which extrinsic evidence may be taken for the purpose of explaining objective obscurity.

(4) Construction of treaties is a matter of law, to be governed by the same rules, *mutatis mutandis*, as prevail in the construction of contracts and statutes.[4]

(5) As contracts may be modified and rescinded, so may treaties

(6) Immoral stipulations are as void in treaties as they are in contracts.

On the other hand, treaties are distinguished from contracts as follows:—

[1] *Supra*, §§ 149–50.
[2] *Infra*, § 208.
[3] *Infra*, § 593.
[4] *Infra*, §§ 664 *et seq.*; see Foster *v.* Neilson, 2 Pet. 253.
[5] *Infra*, § 161.

(1) Contracts (unless we regard marriage as a contract) are, in all cases, the subjects of a suit for debt or damages, or for a specific thing. But no such suit lies on breach of treaty.

(2) Contracts can only be vacated or rescinded by consent, or by the action of a court. But this is not necessarily the case with a treaty. There is no court which can be appealed to, to dissolve it; and when one party violates its terms, the practice is for the other party to declare it not to be any longer binding.

(3) While a contract may be annulled on the ground of fraudulent influence exercised by strength over weakness, such a reason cannot be set up for regarding a treaty as a nullity, since all nations are supposed to stand on the same footing with equal opportunities of detecting fraud. And there are many cases of finesse and false coloring or suppression of facts which would avoid contracts, which would not, *mutatis mutandis*, avoid a treaty. If *suppressio veri* abrogated treaties to the extent it abrogates contracts, few treaties would stand.

(4) A treaty based upon a war accepts the results determined by the war, unless otherwise provided, while a contract does not necessarily assume the existing relations of the parties as a basis.[1]

(5) A consideration is essential to give effect to a contract, but it is possible to conceive of a treaty which has no consideration. A state, for instance, may, without any detriment

[1] "The *uti possidetis* is the basis of every treaty of peace, unless it be otherwise agreed. Peace gives a final and perfect title to captures without condemnation; and as it forbids all force, it destroys all hopes of recovery (of vessels) as much as if the vessel was carried *infra praesidia*, and condemned." 1 Kent's Com., 174, citing The Legal Tender, reported in Wheat Dig. 302; The Schooner Sophie, 6 Rob. Ad. 138.

Special treaties between particular nations are to be distinguished from international engagements made between several nations to settle some general question of international law. A refusal by one party to perform his share in execution of a treaty releases the other. With general international engagements—(*e. g.*, that prohibiting the use of explosive compounds), the same result does not follow. The treaty remains, and if one of the parties refuses to do his part, he may be mulcted by reprisals. A partial repeal of such a treaty does not affect other portions of the treaty. This is the case with some of the settlements of the congress of Vienna, which remain in general force, notwithstanding some partial modification.

to itself, enter into a treaty stipulation by which much advantage is gained by another contracting party, but this is nevertheless a treaty.

(6) A contract, if duly executed by an agent with full powers, binds the principal. This, however, according to modern practice, is not the case with treaties, which a sovereign may refuse to ratify even if signed according to his instructions.

Treaty must be duly authorized, and when requisite, must be ratified.

§ 158. A treaty to be valid, must be duly executed by a party authorized to do so by the sovereigns concerned. If the ambassador has exceeded his instructions, or if any extraordinary incident has intervened such as would justify a principal in refusing ratification to his agent's acts, then ratification may be refused by the sovereign to whom such treaty is submitted for his action.[1]

[1] *Supra*, § 144. In the United States a treaty to bind must be approved by a majority of two-thirds of the senate. But, even after such approval, ratification, in the cases put in the text, may be refused, so far as concerns foreign states, by the president. Klüber, § 142; Hartmann, § 46; *infra*, § 505. He may be impeachable in his own country for so doing, but as to the constitutionality of his action foreign states cannot inquire. A treaty, it should be added, may be tacitly ratified in states where there is no constitutional inhibition in the way.

The ratification of a treaty relates back to the time of signing (Hylton *v.* Brown, 1 Wash. C. C. 298); but the treaty does not impose penal responsibility on those carrying on the war after the conclusion of the peace when such parties were ignorant of the treaty. 1 Kent's Com., 171; Hylton *v.* Brown, 1 Wash. C. C. 298. Whether there is civil liability on the part of an officer who makes captures after conclusion of peace, he being ignorant of the fact, has been doubted. Lord Stowell held that the officer actually doing the harm might be held responsible, but not his superior officer, who was in no way concerned in the commission of the injury. The Mentor, 1 Rob. Ad. 170; see the Ostsee, 9 Moore, P. C. 150.

That ratification is generally essential see Lawrence's Wheaton, p. 452. note 151. Speech of M. Guizot, Moniteur, Feb. 1, 1843; 1 Ortolan, Diplomatie de la Mer, 85–89.

That the rule in Great Britain is that a treaty does not become absolutely binding until it has been ratified, see speech of Mr. Gladstone, in parliament, Aug. 10, 1870.

See, also, 1 Fiore, Nouv. Droit Itern., 476. But ratification may be dispensed with by a secret protocol annexed to the treaty (Lawrence's Wheaton, p. 454).

That treaties and statutes come in *pari passu*, see *infra*, §§ 383, 506.

§ 159. The fact that a majority of civilized states agree to a particular reform does not make such a reform obligatory on dissenting states, though it binds the states signing. The agreement by a majority of the states, for instance, making privateering and the slave trade piracy, does not bind states not signing.[1] It is argued by Holtzendorff, however, that propositions assented to by a great majority of powers for the amelioration of the severities of war (*e. g.*, the neutralization of hospitals) do not lose their general effect by the dissent of a small minority; but this position cannot be accepted as a general rule.[2] So far as contains special treaties, only the parties, as a rule, are bound by them, though a state for whose protection a treaty is made may, by accepting its benefits, be bound by its provisions.[3]

Only the parties to a treaty are bound by its terms.

§ 160. The securities which are provided for the due execution of treaties have been classified as follows:—

(1) Solemn asseverations of fidelity. In the old treaties, the "tres sainte et indivisible Trinité" was appealed to; in the treaty of Paris, the name "du Toutpuissant."

Pledges granted on treaties.

(2) Hostages used by the old practice to be given; and fortresses or other important sites were left in the hands of one of the parties until the treaty was fully complied with on both sides.[4]

§ 161. Where a war takes place as to the subject-matter of a treaty, or is in any way induced by the treaty, the war abrogates the treaty. Stipulations in a treaty which do not concern the subject-matter of the war, though suspended by the war, revive on its termination. Stipulations which concern the mode of carrying on war (*e. g.*, as to the use of certain modes of warfare, or the neutralization of hospitals) continue in force during war.[5]

Treaties abrogated by subsequent war and other limitations.

[1] *Infra*, § 201; see *supra*, § 155.

[2] Thus the United States refuses to be bound by the rule adopted by European powers as to privateering, *infra*, § 201.

[3] *Supra*, § 155.

[4] See as to hypothecations, *supra*, § 149.

[5] Holtzendorff, *ut supra*, 1228, citing Tronci, Saggio filosofico giuridico sulle

A treaty, also, may be abrogated under the following circumstances:—

(1) When the parties mutually consent.[1]

(2) When continuance is conditioned upon terms which no longer exist.

(3) When either party refuses to perform a material stipulation.

(4) When all the material stipulations have been performed.

(5) When a party having the option elects to withdraw.

(6) When performance becomes physically or morally impossible.

(7) When a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists.[2]

convenzione internazionali, 1864; Probst, Die Lehre vom Abschluss Verträge, 1882; Jellinek, Die rechtliche natur der Staatenvorträge, 1880; and see, further, Hartmann, § 56.

[1] *Supra*, § 157.

[2] See, fully, Hartmann, § 56.

In most of the old treaties were inserted the "clausula rebus sic stantibus," by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect it is not necessary that the facts alleged to have changed should be formal conditions. It is enough if they were strong inducements to the party asking abrogation.

The maxim, "Conventio omnis intelligitur rebus sic stantibus," is held to apply to all cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice.

Kent (Commentaries, v. i. p. 420) says: "As a general rule, the obligations of treaties are dissipated by hostilities. But if a treaty contain any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All those duties of which the exercise is not necessarily suspended by the war subsist in their full force."

On the question of the effect of war on treaties, see, further, Field's Code Int. Law, § 905, citing Bluntschli, § 718; Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464; the debate in the house of commons, on the declaration of Paris, of 1856; Speeches of Sir George Lewis and Mr. Bright, of March 11 and 17, 1862; and of the Earl of Derby, of Feb. 7, 1862; Dispatch of Mr. Marcy to Mr. Mason, of Dec. 8, 1856; Phillimore's Int. Law, iii., App. 21; Dana's Wheaton, note 143, p. 352.

VI. Diplomatic and Consular Agents.

§ 163. In its larger sense diplomacy includes the internaıal political intercourse of states; and all foreign nisters engaged in conducting such intercourse, ., secretaries of foreign affairs, as well as ambasors, are held to be internationally diplomatic agents. In its rrower sense the term diplomacy designates the intercourse foreign ambassadors with each other and with the courts to ıich they are accredited.[1] But while diplomacy is a system law, its success is largely dependent on tact and conciliay temper.[2]—The old usage was to send special embassies to ect particular ends. In the seventeenth century, however, e practice of permanent embassies became among the great wers universal, and these embassies embraced a numerous ite. Gradually a distinctive science, that of diplomacy, us grew up. This science embraces not merely the rules of

Diplomacy a system of law.

[1] Hartmann, § 31.

[2] In Lorimer's Treatise on the Law of ations (1883), p. 286, we have the folwing: "The extent to which a naon enjoys that indefinable power hich is known by the name of *presge*, and the due employment of which ten supersedes the necessity for an ppeal to more formidable factors, deends as much on the sympathetic and nciliatory manners of its official repsentatives as on the reputation of s soldiers for valor or its citizens for ealth. Our transatlantic descendants ave always been specially mindful of is fact; and it has often occurred to e that their astuteness in this respect ay have something to do with the reater good-will that is shown to them an to ourselves by continental naons."

So far as the United States are conerned, they have no reason to complain of the want of "conciliatory anners" on the part of recent British iplomatists and consular representatives. British consuls, in the main, have been peculiarly kind and conciliatory in their bearing to the communities in which they reside; and, with the exception of Mr. Crompton, there has been no British minister in the United States of late years who has not done whatever good temper and tact could do to cultivate friendly relations between the two nations. The contrast between the recent attitude of foreign ministers in this country and their early attitude, is very marked. Mr. Hammond, British minister to the United States during Washington's presidency, took no pains to maintain friendly relations with the then Federal administration, while Genet, the French minister at the same time, took particular pains to insult that administration. The consequence was that while Hammond did nothing to soothe the still prevalent hostility to England, Genet almost plunged us into a war with France.

international law, public and private, but the details of ceremonies which have been adopted and become settled in diplomatic intercourse. Officers of various grades are thus employed. Merely business and commercial details are placed in the hands of the consuls or syndics (syndici); while secretaries and interpreters are employed for other parts of the work. Embassies, in their technical sense, have the following specific duties: 1. Conducting negotiations with the state where they are accredited; 2. Examination of the legal and political relations of the state they represent with the state to which they are accredited, and the collection and forwarding of information in regard to matters of business or political interest to the state represented; 3. promotion of friendly relations between such powers.[1]

Ministers sent from government to government.

§ 164. A diplomatic agent represents exclusively the government by which he is commissioned, and is to address exclusively the government to which he is sent. He represents the government commissioning him as speaking for the country as an aggregate, whatever may be his personal antecedents and predilections; and it is at least an indiscretion on his part to speak of himself or the administration he represents as the organ of a party as distinguished from the whole country from which he comes.[2] On the other hand, he can officially address on political matters, in the country to which he is accredited, exclusively the established government of that country; and for him to appeal to the people as against the government, or even to express his views as to the politics of such country through the press, is an indecorum which will justify

[1] Holtzendorff, *ut supra*, 1229, citing Mirus, Gesandschaftsrecht, 1847; Martens, Manuel Diplomatique ou précis des droits et des fonctions des agents diplomatique, 1822; Grenville Murray, Droits et devoirs des employés diplomatique, London, 1853; Esperson, Diritto diplomatics, 1872; Heffter, § 200; Bluntschli, § 159; Pradier-Fodere, Cours de droit diplomatique, 1881; Lewy, des consulats et des ambassades, 2d ed., 1876.

[2] This was made by Mr. Webster and Mr. Calhoun the ground for the rejection by the United States Senate of Mr. Van Buren as minister to England. Whether Mr. Van Buren's official course is open to this interpretation may now be well questioned.

his dismissal by such government.[1] *À fortiori*, "if ambassadors should be so regardless of their duty, and of the objects of their privilege, as to insult or openly attack the laws or government of the nation to whom they are sent, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall; or they may be dismissed and required to depart within a reasonable time."[2]

Belligerents and insurgents may be represented.

§ 165. It does not follow, however, that a government may not receive political agents from insurgents in a foreign country with which such government is at peace; and this position is strengthened when such insurgents are recognized as belligerents by the government against which they revolt.[3] For some time before the recognition by France of the independence of the United States, the United States had political agents in Paris who had a *quasi* recognition from the French government; and there is now a general acquiescence among European publicists, in the position that Messrs. Mason and Slidell, sent during the late civil war by the Confederate government to France and England, were at least diplomatic representatives to such an extent as to entitle them to a free passage on the high seas on neutral ships. Even when representing belligerents such agents may be sent, not on a belligerent, but on a pacific mission.[4]

State receiving and state sending have discretion.

§ 166. A state to whom an ambassador is sent may object (1) to any diplomatic intercourse whatever with the state sending; or (2) to the particular person sent. The first objection is one of great seriousness, and may constitute a *casus belli*. The second objec-

[1] This view was taken by Mr. Jefferson in Genet's case, in 1797.

[2] 1 Kent's Com., 38.

[3] *Infra*, §§ 228–9; *supra*, § 141.

[4] See Abdy's Kent, 135; Dana's Wheat., note 121. On the other hand, Mr. Seward has declared that it is the practice of the United States not to hold official or unofficial intercourse with agents of insurgents in a state with which the United States are at peace. Ex. Doc. 20, 39th Cong., 1st sess.; cited Dana's Wheat., note 41; Mr. Seward to Mr. Bigelow, March 13, 1865, Dip. Corr. 1865, pt. 3, 378; but see, *contra*, *supra*, § 141, for Hülseman correspondence. As to case of Mason and Slidell; see *infra*, § 228.

tion—that to the person of the ambassador—if not frivolously or impertinently used, cannot be the ground of offence. Of such refusals to receive particular persons we have numerous illustrations. The United States have refused to receive or have requested the recall of persons who have improperly interfered in politics in the United States. Sovereigns, also, have refused to receive ambassadors who were their own subjects; nuncios of the pope have been refused on the ground that they would exercise a special religious influence prejudicial to the welfare of the state to which they were sent. The pope, on the other hand, has refused to receive cardinals as ambassadors. Women are not excluded from the post, some of the most creditable treaties having been negotiated by women.—The benefit to be derived from permanent embassies is illustrated by the tenacity with which the Western powers have insisted on the establishment of such missions at Pekin.—It should be added that a minister may be accredited by a formal power plenipotentiary, or, as is the case with chargés d'affaires, by informal correspondence with secretaries.[1]

Inviolability and extra-territoriality of embassies.

§ 167. The inviolability of an ambassador is an essential to diplomatic intercourse. He represents the dignity and sovereignty of his own state, and an attack on him is an attack on that state.[2] The privilege extends to the ambassador's suite, to the servants of the embassy dwelling in the same hotel, to its hotel and its furniture, to its correspondence, and to its couriers when engaged in its service. This involves exemption from local law. If the parties so priviledged abuse their privilege, the proper course, under such circumstances, is to dismiss the offending

[1] "A nation may refuse to receive, as public agent, any one who is personally objectionable, on informing the government by which he is sent that the refusal is for personal reasons; but the reasons need not be more particularly stated. 2 Phill. Int. Law, 149.

"Several cases of refusal on personal grounds are mentioned in Klüber, § 187, note d; Dana's Wheaton, § 251, note 137.

"Dana's Wheaton, § 210, allows the refusal, if the motives are alleged. But the above rule should seem to be sufficient."—Field's Code of Int. Law, § 99.

[2] See Hartmann, § 38.

minister, with the proofs of his guilt.[1] The prevalent view, so far as concerns civil process, is that the doctrine of extra-territoriality does not apply (1) in cases where, from the nature of the case, no other jurisdiction exists than that in which the embassy holds its seat, *e. g.*, suits for real estate; (2) in cases where the ambassador sues, and the claim against him is set up by way of set-off; (3) in cases in which the ambassador voluntarily submits to a hearing before arbitrators, in the same sense in which a sovereign may agree to an arbitration;[2] (4) in cases where the ambassador, with the consent of his government, submits himself to the jurisdiction; (5) in cases where the ambassador is a citizen or subject of the state to which he is accredited, or when he is at the time in the service of such state; (6) in cases where the ambassador engages in trade, and the suit is brought in respect to such trading engagements.[3] This extra-territoriality protects ambassadors, also, from prosecutions for crime. No matter how heinous a crime committed by a diplomatic agent within the state to which he is accredited may be, that state cannot institute against him proceedings to try him for the crime. The only remedy is to send him home to his own sovereign, who alone has jurisdiction over him.[4] But the better opinion is that taking refuge in an ambassador's hotel does not protect a subject from arrest in such hotel on a criminal charge under order of the *judex situs*.—The privilege of extra-territoriality no longer gives the ambassador, as was once supposed to be the case, the power to execute penal discipline upon his subordinates, although this privilege was at one time claimed.[5]

[1] That the privilege does not exist when the ambassador is a subject of the state to which he is accredited, see Hartmann, § 38.

[2] An ambassador, also, cannot be compelled to testify in a court in the state of his embassy. The privilege is one of the sovereign, which the ambassador cannot waive.

[3] See Phill., ii. 222, 3d ed. As questioning the last limitation, see Magdalena Nav. Co. *v.* Martin, 2 El. & El. 94; Valarino *v.* Thompson, 3 Seld. 576.

[4] Phillimore, ii. 202. In England and in the United States, foreign ministers are protected from arrest by statute. Whart. Crim. Law, 8th ed., § 282.

[5] According to Hartmann (§ 38), the servants and family of an ambassador retain the forum which they possessed before the beginning of his diplomatic service. "If the state he represents

matter of courtesy, he is entitled to receive his goods duty free. He is obliged, however, to pay taxes fixed *in corpore* on specific articles he may purchase.

gives him jurisdiction over his family and suite, and this is accepted by the state receiving him, then the jurisdiction would follow; but except in this case the ambassador has no jurisdiction, least of all of a criminal order." Ibid., citing Wildman, i. 126; Grotius, ii. c. 18; Bynk. F. L. xv.

That extra-territorial privilege in this respect cannot be waived by implication, see U. S. *v.* Benner, 1 Bald. 234.

That there may be a voluntary submission to the arbitrament of a court, see Taylor *v.* Best, 14 C. B. 487.

"A public agent is not subject to the jurisdiction of the nation, within the territory of which he resides or exercises his functions, for official acts done under the direction of the government of his nation.

"Halleck (p. 243) states this rule as applicable to consuls. Perhaps it should be restricted to those agents who have been expressly received by the nation in which they exercise their functions. See Guide Pratique des Consulats, vol. i. p. 10."—Field, Code of Int. Law, § 108.

That secretaries of foreign legations are thus privileged, see Cabrera, *Ex parte*, 1 Wash. C. C. 232; and so of attachés, U. S. *v.* Benner, 1 Bald. 234; and of domestic servants, U. S. *v.* Lafontaine, 4 Cranch, C. C. 173; see as to requisites for prosecutions in such cases, Whart. Crim. Law, 8th ed., §§ 1821, 1899.

According to Mr. Field (Int. Code, 144), the members of the family, official and personal, of a public minister are exempt from the jurisdiction of the nation to which he is sent, or through the territory of which they pass in company with him, to the same extent as is his person. The extent of this privilege in the early law of England is discussed on its historical side by Mr. Hosack, in his work on the Rise and Growth of the Law of Nations, London, 1882. See Taylor *v.* Best, 14 C. B. 487.

The privilege does not extend to a person taken into the service of the minister, and belonging to a nation by the law of which such person is incapable of making such contract of service, or prohibited from making it. 9 Opinions of U. S. Attorneys-General, 7, where it is said that such a privilege would enable the minister to employ "any discontented wife, . . . rebellious child, . . . the soldiers of a garrison, . . . the sailors from a ship, . . . or a felon."

That a public minister cannot punish members of his family beyond the limit of domestic chastisement, see Halleck, Int. Law, 220.

That the nation of a public minister cannot deprive him of his privileges as a returning minister without his consent, see Torlad6 *v.* Barrozo, 1 Miles (Philada.), 366, 385, where it was held that the institution of an action of trover to recover the archives of the mission, by the *chargé* of a newly recognized government against his predecessor, did not, *ipso facto*, divest the defendant of such privilege.

That a public minister may import free of duty goods for himself and family, see Lawrence's Wheat., 416.

That bearers of despatches to or from a public minister, provided with passports, or other evidence of their cha-

§ 168. An ambassador travelling on his way to the country to which he is accredited, through a third country, pursuing for this purpose a natural and proper route, is entitled to the same privilege as when travelling through the country to which he is accredited. It may be that such country is in a state of war with the third power. This does not destroy the ambassador's right of transit; but if a convenient route is pointed out to him which will not embarrass an occupying army, he must take this route, and cannot be permitted to insist on carving out a route of his own.—Even after an ambassador has been recalled by his own government, and leaves debts in the country to which he was accredited, the better opinion is that he is exempt from process; though it is an open question whether his creditors with specific liens may not retain his goods without judicial process.[1]

Privilege extends to journey.

§ 169. By the congresses of Vienna and Aix-la-Chapelle four distinct kinds of embassies were recognized:—

Classification of embassies.

1. "Ambassadeurs," legates, and nuncios of the pope. These are regarded as the personal representatives of the sovereign by whom they are sent.
2. Ministers plenipotentiary and envoys.
3. Ministers resident.
4. Chargés d'affaires, who are appointed by the minister of

racter, have the same privileges as members of his family accompanying him, for such length of time as may be necessary to enable them to perform their duties as such, see Field's Code of Int. Law, § 157; Heffter, § 204; Lawrence's Wheaton, p. 417; 2 Phill. Int. Law, 196, § 186; and *infra*, § 228.

[1] Wheaton, Elements, i. 103; Bar, § 115; Hartmann, § 38. As to right of belligerent to arrest in a neutral ship diplomatic agents of the other belligerent, see *infra*, §§ 228–9.

In Holbrook *v.* Henderson, 4 Sandf. 619, General Henderson, minister from Texas to France (before the annexation of Texas), was arrested in New York, on his return from France to Texas, on an alleged debt. The court discharged him from arrest, and held that the want in his case of a passport made no difference in the case.

The line of transit may be prescribed by the nation through whose territory the minister may pass at its option. Field's Code Int. Law, § 136; see 2 Phill. Int. Law, 186–189. The limitation here stated was maintained by the government of France in the case of Mr. Soule, in 1854. See Lawrence's Wheaton, p. 422, note; Halleck's Int. Law, p. 234.

foreign affairs, while the three classes first above named are accredited nominally or actually by the sovereign.[1]

These classes have the same privileges; the object of the classification is only to settle precedence. Among representatives of the same class, priority of appointment determines rank.[2]

Consuls not so privileged.

§ 170. Consuls, not being regarded as the embodiment of the sovereignty of their state, but merely business agents, are not in civilized states entitled to the prerogatives of extra-territoriality and inviolability. Sometimes, however, by special arrangements between two powers, consuls are invested with permanent diplomatic functions, and, if so, they are entitled to the privileges above mentioned. Consuls, also, in barbarous or semi-barbarous states, charged as they are with judicial functions, are to be regarded as investing with extra-territoriality the place where their flag is planted.[3] A consul's papers are protected from interference by the local authorities. A consul, also, is internationally entitled to protection in his usual functions, *e. g.*, the taking of acknowledgments; the solemnization of marriages among his countrymen; the administering of oaths in matters relative to the affairs of the land he represents; the attesting of commercial and shipping paper; the conducting of investigations directed by the home government, provided he does not

[1] See Hartmann, § 35; Phillimore (3d ed.), ii. 248.

[2] "Ambassadors include papal legates and nuncios. The distinction, stated in the books, that ambassadors represent the person of the sovereign by whom they are sent, while the other classes of ministers represent their principal only in respect to the particular business committed to their charge (Protocol of the Congress of Vienna, Art. II.), seems now to amount to nothing more than saying that they are the highest class of public ministers. Dignities peculiar to their rank are matter of etiquette, not necessary to be defined in a code."

Envoys include ministers plenipotentiary, envoys ordinary and extraordinary; also, the internuncios of the pope. Bluntschli, § 173, note.

According to Vattel, "the secretary of the embassy (not that of the ambassador) having his commission from his sovereign, is a sort of public minister. But it is hardly necessary to recognize this as a fifth class."

Fiore (Nouv. Dr. Intern., vol. ii. p. 612) holds with some others to the opinion that consuls are a class of *diplomatic* officers, but this is a dispute about rather name than function. Field, Code of Int. Law, § 112.

[3] *Supra*, § 147.

in this way invade the rights of the country in which he resides. The statutes of the United States authorize consuls to receive the protests of ship officers, and to issue copies and certificates thereof, which shall be admissible in evidence in the courts of the United States. They are authorized, also, in absence of parties interested, to take charge of the effects of stranded vessels; to administer the estates of American citizens dying within their consulates; to discharge seamen cruelly treated; to provide for destitute seamen, and to reclaim deserters. By a consular convention between France and the United States in 1778, consuls are allowed to exercise police over merchant vessels of their respective nations, and to determine disputes as to wages of seamen in such vessels.[1]

[1] As to perjury before consuls, see Whart. Crim. Law, 8th ed., § 276.

On the general power of consuls, see Holtzendorff, *ut supra*, 1234, citing Manuel des Consuls, 1837–43; Quehl, das Preussiche und Deutsche Consularwesen, 1863; De Clercq et de Vallet, Guide pratique des consulats, 1880; König, Handbuch des Deutschen Konsularswesen, 1878; Abbott, U. S. Consuls Manual, 1863; U. S. Consular Regulations, Washington, 1881.

Mr. Lorimer gives the consular rules for England in detail, and then proceeds to say (Law of Nations, i. 315): "Notwithstanding the care with which these various documents for their (consuls) guidance have manifestly been formed, her majesty's consuls complain that, in consequence of the want of these consular treaties which continental states are in the habit of contracting with each other, they are placed at a great disadvantage, as compared with their foreign colleagues, when seeking to determine their duties, powers, and privileges;" he adds, as a specimen of the privileges granted by foreign treaties, the consular treaty between France and Italy.

In the United States a consul represents the subjects of his sovereign when there is no special diplomatic representative of such sovereign; Gernon *v.* Cochran, Bee, 209); but though a public agent his authority is ordinarily limited to commercial matters. While he is permitted to interpose claims for the restitution of property belonging to the subjects of his own country, he cannot ordinarily be regarded as in any sense the diplomatic representative of his sovereign. (The Anne, 3 Wheat. 435.) But he may institute proceedings *in rem*, on behalf of the subjects of his sovereign, without special authority. (The Bello Corrunes, 6 Wheat. 152.)

The United States courts have jurisdiction of suits against consuls (St. Luke's Hosp. *v.* Barklay, 3 Blatchf. 259; Bixby *v.* Janssen, 6 Blatchf. 315; Gittings *v* Crawford, Taney, 1); and they cannot be sued in the state courts, nor can they waive their privilege in this respect. (Naylor *v.* Hoffman, 22 How. Pr. 510; Valarino *v.* Thompson, 3 Seld. 576.)

Consular jurisdiction in barbarous and semi-civilized states is discussed *supra*, § 147; Whart. Conf. of Laws, introductory chapter, §§ 15 *et seq.* And

So far as concerns the right to hold property as a neut
against a belligerent, it has been held that a consul of a neut

see Asser, Administration de la Justice en Egypte, in the Revue de droit int. ii. 564; Martens, Konsularwesen in Orient, 1874; Mancini, Reforme Judiciare en Egypte, 1875; Rénault, Etude sur le projet de réforme judiciare en Egypte, 1875; Brauer, Die Deutschen Justizgesetze in ihrer Anwendung auf die amtliche Thätigkeit der Konsuln, etc., 1879. In modern practice a distinction is taken between consuls-general, vice-consuls, and local-consuls. The two first, when endowed with diplomatic functions have the privileges of inviolability.

In the United States consular regulations, as revised in 1881, it is stated (§ 75) that "a consular officer in civilized countries now has, under public law, no acknowledged representative or diplomatic character as regards the country to which he is accredited. He has, however, a certain representative character as affecting the commercial interests of the country from which he receives his appointment, and there may be circumstances, as, for example, in the absence of a diplomatic representative, which, apart from usage, make it proper for him to address the local government upon subjects which relate to the duties and rights of his office, and which are usually dealt with through a legation." In § 76. "Although consuls have no right to claim the privileges and immunities of diplomatic representatives, they are under the special protection of international law, and are regarded as the officers both of the state which appoints and the state which receives them. The extent of their authority is derived from their commission and their *exequatur;* and it is believed that the granting of the latter instrument, without express restrictions, confers on the consul rights and privileges necessa
to the performance of the duties of t
consular office; and, generally, a co
sul may claim for himself and h
office, not only such rights and priv
leges as have been conceded by treat
but also such as have the sanction
custom and local law, and have bee
enjoyed by his predecessors, or by co
suls of other nations, unless a forma
notice has been given that they wil
not be extended to him." § 77: "A
consul may place the arms of his gov-
ernment over his doors. Permission to display the national flag is not a matter of right, though it is usually accorded, and it is often provided for by treaty. . . . The jurisdiction allowed to consuls in civilized countries over disputes between their countrymen is voluntary and in the nature of arbitration, and it relates more especially to matters of trade and commerce. A consul, however, under public law, is subject to the payment of taxes and municipal imposts and duties on his property in the country or on his trade, and generally to the civil and criminal jurisdiction of the country in which he resides. It is, probable, if he does not engage in business, and does not own real estate, that he would not be subject to arrest or incarceration, except on a criminal charge, and in the case of the commission of a crime, he may either be punished by local laws, or sent back to his own country." § 78: "The privileges of a consul who engages in business in the country of his official residence, are, under international law, more restricted, especially if he is a subject or citizen of the foreign state."

It is added that inviolability of the consular archives is secured by treaties with Austro-Hungary, Belgium,

state loses his privileges as against a belligerent by doing business as a merchant in the place to which he is accredited; and, as a general rule, a consul doing business as a merchant in the seat of his consulate merges his consular, so far as privilege is concerned, in his mercantile *status*.[1]

§ 171. We have already seen that there are cases in which consuls of civilized countries exercise jurisdiction over citizens of such countries in barbarous lands. It is now to be observed that there are cases in which consuls in civilized lands have jurisdiction over specific lines of litigation given them by treaty.[2] Thus by consular convention of 1778, between the United States and France, consuls of each country, as has been already noticed, are permitted to exercise police over all vessels of their respective countries, "within the interior of the vessel," and to adjudicate questions concerning wages arising in such countries. Treaties to the same effect have been negotiated with other countries; and congress, by the

Consuls in specified cases have jurisdiction in litigation in foreign lands.

Denmark, France, Germany, Greece, Mexico, Portugal, and Sweden; while inviolability of the consular office and dwelling (but not as an asylum) is secured by treaties with Belgium, France, Germany (of consuls, not citizens), and Italy. Exemption from arrest, except for crimes, is secured by convention with Belgium, Germany, Netherlands, and Italy. "In Austro-Hungary and France he is to enjoy personal immunities; but in France, if a citizen of France, or owning property there, or engaged in commerce, he can claim only the immunities granted to other citizens of the country who own property, or to merchants. In Austro-Hungary, if engaging in business, he can be detained only for commercial debts. . . . In Great Britain, Netherlands (as to colonies), Nicaragua, and Paraguay, they are regarded as appointed for the protection of trade." Exemption from obligation to appear as a witness "is secured absolutely by convention with France, and, except for defence of persons charged with crime, by conventions with Austro-Hungary, Belgium, Italy, and Salvador. In such case the testimony may be taken in writing at his dwelling." By treaties with many states, consuls not owning real estate or doing business in the country of the consulate are exempt from taxation. By some treaties, also, consuls have the right to take depositions, and have jurisdiction of disputes in vessels of the United States.

[1] 1 Kent's Com., 44, 62; 2 Phill., 336; The Falcon, 6 C. Rob. Ad. 194; The Hope, Dods. Ad. 226; *infra*, § 219. By the act of congress, of August 18, 1856, U. S. Stat. at Large, ch. 127, American consuls in particular places are forbidden to engage in trade. The law in respect to consuls is discussed with great fulness in the fourth volume of Lawrence's Com. sur Wheaton.

[2] *Supra*, §§ 147, 170.

statute of June 11, 1864, made provision for the support the jurisdiction thus given to foreign consuls.[1] By statu also, our consuls abroad have power to administer oaths certain cases, and to acknowledge papers; and perjury b fore a consul abroad is punishable as such in a Feder court before whom the offender is brought.[2] In this countr also, it has been held that a foreign consul, received as su by our government, may, without special authority, appe for a citizen of his country in a case in which the latte though absent, is interested.[3]

Exequatur required to consular functions.

§ 172. A consul cannot enter on his duties without the pe mission of the state within whose limits the co sular functions are to be exercised; supposing su state to be civilized. This permission is usual granted by an "exequatur," which may be recall on due grounds. The announcement of the appointment of consul is by *lettres de provision*.—In old times a distinctio was taken between *consules electi* and *consules missi;* the latt being generally subjects of the appointing state, while f *consules electi* this was not necessary. *Consules electi*, also, a generally unpaid, and are allowed to engage in business, whi is refused to *consules missi*. But the tendency among Eu pean states is to restrict consular appointments to *consu missi*, with settled fees, and exclusion from business.

VII. Intervention.

Intervention permissible in matters which disturb public peace.

§ 174. On the subject of intervention two extreme vie have been announced. On the one side it was mai tained by Burke, in his letters on a Regicide Pea that a nation, such as England, holding a co manding position in Europe, is justified in inte vening to put down propagandist anarchy in anoth land; and it was declared by the members of the Holy A liance, in 1815, to be the duty of the "Christian sovereign who took part in that alliance, to unite to repress any Eu pean outburst against legitimacy. This position, howeve

[1] See Lawrence's Wheaton, note 73.

[2] See *Supra*, § 170, note; Whart. Crim. Law, 8th ed. §§ 273–6.

[3] The Bello Corrunes, 6 Wheat 1

has been long repudiated. The chief instance of interference of this class is that of Russia to protect Austria from revolution in 1848; and since then France witnessed the overthrow of the old equilibrium in Germany without protest; and neither Austria nor Russia interfered to prevent the democratization of France. On the other side, it cannot be said that the opposite extreme, that of the *laissez faire*, in reference to foreign states, has acquired unqualified acceptance. In the United States the doctrine of non interference has been generally adopted as an axiom in political economy; yet in the United States there is a general acceptance of the position taken in this respect by Mr. Monroe, under the advice of Mr. J. Q. Adams, so far as it assumes that no European power is to be permitted to interfere forcibly in the domestic affairs of American sovereignties;[1] and in the further position that the control of a canal across the Isthmus of Panama is not to pass into the hands of any one European power. Mr. Gladstone, and the leading members of his cabinet, are adherents of the *laissez faire* school; but by Mr. Gladstone's administration an attack on Egypt, and an at least temporary occupation and reorganization of Egypt have been justified, on the ground that this was necessary to the preservation of European commerce and peace. In semi-barbarous countries, settlements by civilized states have never been regarded as interfering with sound international jurisprudence. England has indefinitely extended her Indian empire, has taken possession of Cyprus, and has acquired at least a temporary dominancy in Egypt. France has occupied Algiers and Tunis, and has obtained control of Madagascar. We may, therefore, hold to the following positions:—

(1) The application of influence by one state over another to mould the latter's political action, is not contrary to the law of nations, provided that force is not threatened.

(2) The application of force, or its threat, to induce a change by another state, either of its political constitution or of its political action as to a third state, is a violation of the law of nations.[2]

[1] See as to qualifications *infra*, § 175.

[2] Great Britain, it should be remembered, disclaimed, when waging war against the French Republic, any de-

(3) It is, however, open to the successful party to insist, on the conclusion of a war, on guaranties which may involve some modifications of the policy of the party vanquished.

sign thereby to interfere in the domestic affairs of France. The ostensible reason was that the decree of the national convention of November 19, 1792, was virtually a declaration of war. See Phill., op. cit., i. 561. This decree was a bombastic resolution to give aid to "tous les peuples que voudront recouvrir leur liberte." See article by Mr. Oscar Browning, in Fortnightly Review for Jan. 1883, where the diplomatic history of this period is reviewed, and where the mistakes of the British as well as the French governments in this respect are pointed out.

In Lord John Russell's despatch, addressed, in 1860, to Sir J. Hudson, British minister at Turin, justifying the interference of the king of Sardinia in aid of the insurrection at Naples, occurs the following remarkable passage: "That eminent jurist, Vattel, when discussing the lawfulness of the assistance given by the United Provinces to the Prince of Orange, when he invaded England and overturned the throne of James II., says: 'The authority of the Prince of Orange had doubtless an influence on the deliberations of the States General, but it did not lead them to the commission of an act of injustice; *for when a people from good reasons takes up arms against its oppressor, it is but an act of justice and generosity to assist brave men in the defence of their liberties.*'" Ann. Reg. 1860, p. 294, Pub. Doc. It must be remembered that at the time the States General intervened in English affairs, there was no armed resistance to the authority of James II. This is a dangerous precedent, and would sustain almost every form of aid given to foreign insurgents.

According to General Washington, "no government ought to interfere with the internal concerns of another, except for the security of what is due to themselves." Sparks's Life and Writings of Washington, xi. 382.

"As regards the citizens of the recognized state, any interference with the action of the local law would be a positive breach of the law of nations. Even in the case of a partially recognized and partially protected state, such interference is forbidden. Lord Dufferin's interposition on behalf of Midhat Pacha (July, 1881) was wholly unofficial in form, however peremptory it may have been in substance. When Lord Granville's attention was called to the persecution of the Jews in Russia, and the alleged sympathy of the Russian government, in the house of lords (Feb. 9, 1882) he declined, with the approval of Lord Salisbury, to interfere officially." Lorimer's Law of Nations, i. 334.

Mr. Webster, in his letter of April 21, 1841, to Lord Ashburton, speaks as follows: "The salutary doctrine of non-intervention by one nation with the affairs of others, is liable to be essentially impaired if, while the government refrains from interference, interference is still allowed to its subjects individually, or in masses;" adding that "the United States have been the first among civilized nations to enforce the observance of the just rules of neutrality and peace, by special and adequate legal enactments against allowing individuals to make war on their own authority, or to mingle themselves with the belligerent operations of other nations."

(4) A nation whose conduct is a menace to its neighbors may be assailed by them, and compelled to alter its policy so as to remove the menace. The case is analogous to that of abatement of nuisances by private action. The doctrine of *laissez faire* gives to my neighbor the right to conduct his business in the way he thinks best. But if he drop a stone on the highway, in front of my house, I am entitled to remove it by force.[1]

(5) The intervention of organized bodies of men from a neutral state on the side of either belligerent in a pending war, is prohibited by international law. It should be remembered, however, that a neutral state may say: "I will not put a strict watch on my subjects in this relation; to attempt to close my ports for this purpose would impose an intolerable burden and expense; but if harm is done by any negligence in this respect, I will be liable to the injured state for the damage." A state, also, may impose a tighter curb on its subjects in this respect than does the law of nations. The same observations apply, *mutatis mutandis*, to the permission by a neutral sovereign to fit out armed vessels in his ports for belligerent use.[2]

(6) It is within the international power of a state, or a league

[1] Lord Bacon thus forcibly puts the doctrine stated in the text: "Neither is the opinion of some of the schoolmen to be received, that a war cannot justly be made but upon a precedent injury or provocation; for there is no question but a just fear of imminent danger, though there be no blow given, is a lawful cause of a war." Essay on Empire. And see *supra*, § 146.

It is only on this ground that the interference of France, Russia, and England between Turkey and Greece, resulting in the independence of Greece, can be sustained. The continuance of the struggle between Turkey and Greece, it was said, imperilled the peace of the Levant.

Sir R. Phillimore (op. cit., i. 555) credits the United States with taking the lead in enunciating sound principles of international law in the statutes of 1794 and 1818. It was not until 1819 that the British statute was passed. So little, indeed, was this statute respected in England, that though there were several English expeditions organized to take part in wars pending in Portugal, in Spain, and in Poland, "no public prosecution of an offender against the provisions of the statute," according to Sir R. Phillimore, "appears to have been formally conducted, by order of the government, in a court of justice, until the period of the recent American civil war; that is, nearly fifty years after the passing of the act."

[2] See *infra*, §§ 241 *et seq.*

of states, to guarantee the independence of another state whose continued independent existence may be regarded as essential to international peace.

(7) Intervention may properly take place at the request of both parties to a civil war.[1]

(8) Recognition of the independence of an insurgent is not by itself intervention.[2]

(9) Intervention can no longer be defended on the ground that it is necessary to maintain the balance of power. The United States form by far the most powerful nation in America, and could overrun at any time Mexico and the countries immediately to the south of Mexico; yet this would not justify an offensive alliance between these countries against the United States. Great Britain is unquestionably master of the seas, yet this would not justify a combination of other powers to wage war on Great Britain. It is only when a great power uses its preponderance of strength to crush its neighbors that a war by them against it can be sustained. If the balance of power is to be perfectly preserved by war, war would never cease, since the slightest preponderance obtained on one side would require from the other rectification by renewal of war. It was in part on these grounds that the United States refused in 1852 to unite with France and England in a convention binding the three governments to renounce forever the intention of annexing the island of Cuba. The proposition was urged by the English ministers "both on account of their own interests, and on account of those friendly states in South America as to the 'present distribution of power' in the American seas."[3] The United States government replied that such an alliance contravened its settled policy. It also refused in 1861, on the same ground, to enter into alliance with England, France, and Spain for the purpose of obtaining re-

[1] This was given by France and England as the excuse for intervening between Holland and Belgium, though the request to intervene was withdrawn by Holland before the act of intervention.

[2] *Supra*, § 140.

[3] It is now known that Mr. Adams's administration, when Mr. Clay was secretary of state, opened negotiations for the purchase of Cuba. Phill., op. cit., i. 601.

redress for injuries supposed to have been sustained by the contracting parties.[1]

(10) But intervention may justly take place to ward off intervention; in other words, there may be cases in which a sovereign may be justified in saying to another sovereign proposing to interfere in a war, civil or otherwise, "if you intervene in this quarrel, I will intervene to keep you off."[2]

§ 175. At the congress of Verona, which was the culmination of the Holy Alliance, it was proposed by Austria, Russia, and Prussia, that there should be an intervention by France in Spanish affairs, for the purpose of assisting the Spanish king in putting down the liberal movement in his domains. England presented a solemn protest against such intervention; and as it was not unlikely that this interference would be extended to the suppression of the revolt of the Spanish colonies in America, this led to a suggestion by the British ministry that the United States should remonstrate against such interference. In response to this suggestion, Mr. Monroe, then president, in his message of 1823, declared, speaking for the United States,[3] "that we could not view any interposition for the purpose of oppressing them (the South American states which had revolted from Spain, and whose independence, we,

Objections to European intervention in America.

[1] The recapitulation by Sir R. Phillimore of the various reconstructions of Europe in recent times will be found peculiarly interesting. See Phill., op. cit., i. 589 *et seq.*

[2] Among more recent illustrations of war to preserve the balance of power may be enumerated the quadruple alliance of England, France, Spain, and Portugal in 1834 to expel Don Carlos from Spain, and the alliance of 1854 between England, France, and Turkey for the purpose of defending Turkey against Russia. As to the first of these alliances, it placed on the Spanish throne a dynasty utterly worthless and incapable of holding the kingdom on which it was forced. As to the second, it added vastly to England's debt, and produced a lavish expenditure of life in the siege of Sebastopol, from which it is difficult now to see any good result. It did not prevent Russia from fighting a single-handed war with Turkey in 1879, and making what conquests she pleased; and even supposing the independent existence of Turkey as a European power was thereby prolonged, that prolongation can only be temporary.

Mr. Seward's argument against British and French intervention in the late civil war will be found in his letter to Mr. Adams of Aug. 18, 1862. 5 Seward's Works, 352 *et seq.*

[3] For "Monroe Doctrine" in Australia, see London Spectator, Dec. 8, 1883, p. 1575.

in common with Great Britain, had acknowledged), or c
trolling, in any manner, their destiny by any European pow
in any other light than as a manifestation of an unfrien
disposition towards the United States." The proposed int
vention in South America by the allied sovereigns havi
been thus opposed by the United States as well as by Gre
Britain, was not further pressed; and, under such circur
stances, a resolution offered in the house of representative
protesting against such intervention, was withdrawn. M
Monroe, in his message, declared, in addition, "that tl
American continents, by the free and independent condition
which they have assumed and maintained, are henceforth not
be considered as subjects for future colonization by any Eur
pean power." Mr. J. Q. Adams was then secretary of stat
and was responsible for this portion of the message. I
1825, when president, he addressed a special message
congress in reference to the Panama Congress, in which h
states that "an agreement between all the parties repre
sented at the meeting, that each will guard by its ow
means against the establishment of any future European col
ony within its borders, may be found desirable:" And he
then gave the following significant exposition of Mr. Monroe's
declaration: "This was more than two years since announced
by my predecessor to the world as a principle resulting from
the emancipation of both the American continents." The
house of representatives was at the time, however, in strong
opposition to Mr. Adams's administration, and was peculiarly
indisposed to unite in approving of so distinctively administ-
tration a measure as the congress of Panama. With this was
mingled a growing distrust in the permanency of the govern-
ments of the various South American republics with which
it was proposed to combine. But whatever may have been the
motives, the house expressed an emphatic disapproval of the
administration project. The United States, so it was resolved
by a party majority, "ought not to become parties" with the
South American governments "to any joint declaration for
the purpose of preventing the inte[illegible] of any of the
European powers with their independ[illegible] rn-

ment; or to any compact for the purpose of preventing colonization upon the continent of America." In 1848 the question was again brought up by Mr. Polk, then president, who in a message to congress stated that the government of Yucatan had offered the protectorship of that country successively to Great Britain, the United States, and Spain, and called o congress to take measures to prevent any part of the Am can continent from being subjected to the control of any ropean power. The Yucatan movement towards a pro ship, however, was so ephemeral that no congressiona towards its prevention was necessary, and it be plain that congress as a body was not disposed measure tending to affirm the position taken The debate in the senate was marked by a ma intervention, by Mr. Calhoun, in the cou stated, as one who had been a member cabinet, that the position taken by Mr. P beyond Mr. Monroe's declaration. It other countries on this continent to their wars," since, whenever any suc in internal warfare, and the weake we would be bound, according o give them support for fear the he country may be made to so ed." "To lay down the princip olsey, when commenting on Mr. acquisition of territory on thi an power, cannot be allowed by t far beyond any measure dictated of power, for the rule of self-pr in our case; we fear no neigl rinciple that no political system e from republican forms to those d by the Americans, would be a resses at Laybach and Verona, f ction to their political fabrics, st attempts of European powers of states on this side of the v osition to interference. Any- thi ystem which arbitrary govern-

ments have initiated for the suppression of revolutions main force."[1] But this does not apply to the recognitior the part of European powers of belligerent insurgents in country, or even expressions of sympathy with such in gents.[2] England at an early period of their revolt recogni in full accordance with the United States, the independe the Spanish South American colonies; and the Un tates were prompt not only to recognize the independe Greece and of Belgium, but, in the case of Greece, to pathy as well as to extend assistance to the furtl neutral obligation.[3]

Law, § 147.

infra, §§ 240 *et seq.*

1868, when secre- a treaty with Colombia, and uring some with that Mr. Baker, his War, p. Cush- in- is A trea was minist by the s unknown approval of States." (App. 108, 704; Secre March 8, 1880; Ex. 46th Cong. 2d sess.) test against French int in Mexican affairs, thou the house of representativ over, no doubt with the as. administration, without acti senate. And Mr. Seward, in h. to Montholon, of December 6, 186 not place his objections to French terference in Mexico on the ground the Monroe doctrine, but on the ground that "the people of every state on the American continent have a righ secure for themselves a republican ernment if they choose, and that i ference by foreign states to prevent enjoyment of such institutions deli ately established is wrongful, an its effects antagonistical to the free popular form of government existir the United States." (Diplom. His the War, 427.) A striking speec this topic by General Dix will be fc in Dix's Life, i. 217, in which he that the protests of Presidents Mo nd Polk "are sustained by an u led public opinion, even though not have received a formal resp ongress." This is true so fa ns the arbitrary interfer an sovereigns in Amer e attempt of any Euro ain the control of uma. But the doct tended so as to ower from recei (*e. g.*, for cos erritory in S roe doct Canal ne, 1 1

VIII. Naturalized and other Residents—Slaves.

§ 177. Until the middle of the present century, the prevalent doctrine was that allegiance could not be divested or repudiated. No matter how long a party may have been absent from his native land, no matter how solemnly he may have abjured his native allegiance, no matter how sacred may have been the ties he may have formed in his new home, his allegiance of birth was held to continue; and this doctrine was held in the United States as well as in England.[1] It is now, however, generally agreed that personal expatriation is in accordance with the law of nations; and there are no civilized nations which do not now grant naturalization in some shape to proper applicants. Treaties, also, are in existence between the principal states of Europe and the United States by which the rights of naturalized citizens are reciprocally respected. Difficulties, however, arise in cases of conflict between naturalizations, and in respect to naturalization fraudulently obtained in order to elude conscription or taxation. By some states naturalization is only granted on the production of a release from the original allegiance. This, however, is not the rule in the United States, where emigrants are naturalized without any such certificate; nor is it consistent with our institutions that such a condition should be prescribed.

Naturalization now generally accepted.

The following conclusions may be considered as settled:—

(1) A naturalization obtained fraudulently, not for the purpose of transferring allegiance and residence, but for the purpose of evading some duty to the native state, may be treated as void by the latter state, should the party naturalized return to its shores.

(2) A legitimate child takes its father's nationality, an illegitimate child that of the mother.[2]

(3) Between particular states the duties and privileges of naturalization are regulated by treaties. Among these treaties

[1] Whart. Conf. of Laws, § 5, and cases there cited. As to constitutional limits, see *infra*. § 431.

[2] See *infra*, §§ 256 *et seq.*, 432

may be mentioned that of 1868 between Germany and the United States.[1]

(4) It should be added that France holds to the permanent allegiance of her subjects more strongly than do other European states, insisting in many instances that they cannot divest themselves of this allegiance even when settled in a foreign land.[2]

(5) The naturalization of the husband, according to the old view, carries with it the naturalization of the wife, though it may be doubted whether this rule obtains in states where married women have the capacity of independent action, and where the husband insists, against his wife's wishes, she refusing to accompany him, upon crossing the seas to accept the nationality of a foreign land under conditions entirely different from those under which the marriage was solemnized. It is otherwise if she accompany him, and it is clear that the naturalization of a father carries with it the naturalization of his minor children whom he takes with him.[3]

Foreigners subjected to law of place of residence.

§ 178. In most civilized states (the rule as to barbarous and semi-civilized states having been already considered)[4] a foreigner is entitled to the immunities of citizens, though he is in most jurisdictions compelled to give security on bringing suit, and cannot act in a fiduciary capacity without giving bond. In some states an alien is prevented from acquiring real estate beyond a certain limit. But there is no limitation on the acquisition of personal property (*mobilia*), and under the constitution of the United States a foreigner has the special privilege of suing in the Federal courts. When a foreigner is indicted for a crime, he cannot, by our practice, set up his alienage as a defense, although by the English common law

[1] See on this topic the enumeration of treaties in Whart. Conf. of Laws, chap. i.

As to naturalization in the United States by statute and by annexation, see *infra*, §§ 431 *et seq.*

That naturalization creates political status, see *infra*, § 262.

[2] That marriages of Frenchmen in a foreign land will be declared void if not solemnized according to home laws, see Whart. Conf. of Laws, 2d ed., §§ 151, 162, 173, 185.

[3] Whart. Conf. of Laws, §§ 8 *et seq.* *Infra*, § 262.

[4] *Supra*, § 147.

he is entitled to a jury of which a portion should be of a race speaking his own language. An interesting question arises when a foreigner is indicted for a political offence which he is required to commit by his own sovereign. In such a case the command of the foreign sovereign is no defence. If the defendant, in such a prosecution, is convicted in violation of the law of nations, it is the duty of the executive to interfere with a pardon. If this is impracticable, the question is one for international adjustment. A foreigner cannot say that he is not bound to obey the laws of the state where he is sojourning. But if the act for which he is convicted is one enjoined by his own sovereign, then that sovereign must be held responsible.[1]

[1] See, on the above topic, Whart. Con. of Laws, §§ 819, 820; Whart. Crim. Law, 8th ed., §§ 269, 281, chap. i.; Holtzendorff, op. cit., 1215; Bonfils, De la competence des tribunaux français à l'egard des Estrangers, 1865; Ueber die Fehler des Franz. Civilrechts bezuglich der Fremden. As to compulsion by sovereign as a defence, see *supra*, § 144: *infra*, § 210; Whart. Crim. Law, 8th ed., §§ 94, 283, 310; Ford *v.* Surget, 97 U. S. 594, cited *infra*, § 210. As to conflicts of criminal jurisprudence, see *infra*, §§ 350 *et seq.*

Sir R. Phillimore (op. cit., 445), differing in this respect from Heffter (§ 58), holds that, "as a general proposition, a man can have only one allegiance." But I must agree with Heffter in holding that a mere resident in a state owes, for the time being, allegiance to such state, and may be guilty of treason to such state if, as a private person, he wages war against it, or renders comfort to its enemies. Cobbett, for instance, when in the United States, was never naturalized, nor did he ever restrain himself from declaring that he was and meant to continue to be a British subject; yet no one would have pretended that Cobbett, while residing in the United States, was not liable to be indicted for all offences, political or otherwise, made indictable in the place of his residence. The same position has been repeatedly taken by the British government in respect to citizens of the United States who, when residing in Ireland, have been engaged in conspiracies against the British government. The question, however, may be merely of the meaning of words, since Sir R. Phillimore, in the next page to that from which the above passage is cited, says: "All strangers *commorant* in a land owe obedience, *as subjects for the time being*, to the laws of it." That the home sovereign has allegiance due him from such persons is maintained by all civilized states, there being no such state which does not maintain its right to levy taxes on such persons, and to hold them responsible for all offences committed by them against its sovereignty. Whart. Crim. Law, 8th ed., §§ 269 *et seq.*, 281; Phill., op. cit., 455; Van Wyck, De delictis extra regni territ. commiss., Utrecht, 1839. As to commer-

§ 179. It is within the constitutional power of a sovereign to exclude foreigners, either as a class or specially from his

cial domicil, see *infra*, § 219. That residence establishes belligerent character, see Johnson *v.* Falconer, 2 Paine, 601; S. C., Van Ness, 1.

It has been held in England, that where a foreigner in England is guilty of a breach of neutrality in conspiring against his native country, the English government will undertake the prosecution, and will not leave it to the representatives of the foreign state. See debate in the house of lords, March, 1853.

The following citations are from Fields's Code of Int. Law, 2d ed., p. 87:—

"In 1799, certain English subjects were prosecuted for publishing a libel upon Paul I., emperor of Russia. They were convicted and punished by fine and imprisonment. State Trials (Howell), vol. xxvii. 627–630.

"In 1803, Jean Peltier, a French refugee, was prosecuted for a libel on Napoleon Bonaparte, then first consul of the French Republic. He was convicted, but the breaking out of war prevented his receiving judgment. State Trials (Howell), vol. xxviii. 530–619 (see R. *v.* Most, cited *supra*, § 138).

"Woolsey (International Law, § 79) says: 'A nation has a right to harbor political refugees, and will do so, unless weakness of political sympathy lead it to a contrary course. But such persons may not, consistently with the obligation of friendship between states, be allowed to plot against the person of the sovereign, or against the institutions of their native country. Such acts are crimes, for the trial and punishment of which the laws of the land ought to provide, but do not require that the accused be remanded for trial to his native country.' See, also, Wildman's International Law, p. 59; Law Lib., vol. lii. p. 42.

"After the attempt to assassinate the emperor of the French on the 14th of January, 1858, the French minister of foreign affairs represented that plots to assassinate the emperor had been formed in England, and asked that England should provide for the punishment of such offences. In accordance with the request, Lord Palmerston, being prime minister, on the 8th of February introduced a bill for the punishment of conspiracies formed in England to commit murder beyond her majesty's dominions; but the bill was rejected, and the ministry immediately resigned. The bill was opposed by some from an unwillingness to interfere in any way with the right of asylum; but the controlling reason evidently was a feeling that the French government had used too dictatorial a tone in demanding the passage of such a law. Annual Register, 1858, pp. 5, 33, 202; Annuaire des deux Mondes, 1857–8, pp. 32, 110, 420; cited in Lawrence's Wheaton, p. 246, note.

"The same application was made to Sardinia, and a law was passed there making it a special offence to conspire against the lives of sovereigns, although the punishment originally proposed in the bill as introduced by the ministers, was mitigated by the chambers. M. Cavour sustained the measure, both on political grounds and because he deemed it important that Sardinia, under the circumstances in which she was placed, should not act in opposition to the views of France. Annuaire de deux Mondes, 1857–8, p. 216."

As to effect of annexation on allegiance, see *infra*, § 433.

shores.[1] This right, which is called in the books the *Droit de renvoi*, was exercised by England in 1792, under an act of parliament called the alien act; and a similar act was passed by our own congress during the administration of John Adams. The constitutionality of such a statute was at the time questioned; but there can be little doubt that as an exercise of the war power or as a means of suppressing insurrection, it may be sustained: The constitutionality of the Chinese exclusion act of 1880, may be defended on the ground of the general right of the Federal government to regulate commerce and emigration. It is proper, however, that the ground of such non-reception or expulsion should be notified to the nation whose citizens are thus repelled.[2]

Foreigners may be excluded on general or special grounds.

§ 180. A domiciled resident, even though not naturalized, has duties laid on him greater than those imposed on transient visitors. He becomes liable to local taxation, and he is so far steeped in the jurisprudence of the country of his domicil that by it his family relations are determined, and his personal estate is distributed after his death.[3] A modified grade of domicil, as will be hereafter seen, has been held in England to attach to persons who

Duties pertaining to domicil.

[1] Lorimer, Law of Nations, i. 344.

[2] "It is a received maxim of international law, that the government of a state may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it." Phil. Int. Law, i. 407. And see *supra*, § 146.

According to Martens, the sovereign has a right to forbid foreigners to enter his dominions, without express permission first obtained, even if such entry be not prejudicial to the state; but no European power now refuses in time of peace to grant permission; nor is it even necessary for such subject to ask permission. Martens's Law of Nations, Bk. 3, ch. 3, § 2.

See as to Chinese emigration, *infra*, §§ 264, 435; Whart. Con. of Laws, 2d ed., Introduction; and on the general topic Holtzendorff, *ut sup.*, citing Nicot, Etude historique sur le naturalisation, 1868; Westlake, De la naturalisation et de l'expatriation, 1868; Munde, Bancroft Naturalization, 1868; Marlitz, Recht der Staatsgehörigkeit, in Hirth's Annalen, 1875; Desfontaines, De l'Emigration, 1880; De Folleville, Traité de la naturalisation, 1880. As to quarantine, see Sir S. Baker, International Rules of Quarantine, 1879. As to police exclusions under the Federal constitution, see *infra*, §§ 425, 486, 565.

[3] See as to discussion whether domicil or nationality, impresses these characteristics, Whart. Con. of Laws, 2d ed., §§ 32 *et seq.*; *infra*, §§ 254 *et seq.*

sojourn in a foreign country for the purposes of trade, and wh
when such country becomes a belligerent, have been viewed
impressed with its nationality.[1]

Slave trade no longer allowed.

§ 181. It was held by Lord Stowell, in 1817,[2] and subs
quently by the supreme court of the United State
that the slave trade is not piracy by the law
nations, nor, in itself, illegal.[4] At that time slave
was recognized by law in the United States and in Russia,
well as in minor states, and, though the slave trade was pira
by statute law in the United States and in England, it h
not been declared illegal by France, and it was tacitly san
tioned by Brazil. Since then, however, the conditions ha
changed. In 1818, a year after Lord Stowell's decision, t
slave trade was made illegal in France, and there is no po
tion of the civilized world in which it is now sanctione
This, taken in connection with the abolition of slavery in th
United States and in Russia, leads us to the conclusion tha
by the law of nations, the slave trade is no longer legal. T
steal goods on the high seas is an offence against the law of n
tions, and so is the exportation of stolen goods. If this is th
case with the stealing of goods, why not with regard to th
stealing of men? Even if, as in the case of England and th
United States, such an offence be not larceny, it is indictabl
as abduction; and, aside from this reasoning, since by a
civilized states the slave trade is now a criminal offence, w
may hold that, by the consent of all nations, it is now a
offence internationally.[6] If this be the case with the forcibl
abduction and transportation of persons of African descent, i
is also the case with regard to the capturing and reduction
into slavery of persons of other races. This, however, doe
not preclude the temporary detention and incarceration o

[1] *Infra*, § 219; see Wildman, ii. 40; Hartmann, § 85. As to domicil generally, see *infra*, §§ 254 *et seq.*

[2] The Louis, 2 Dod. Ad. 240.

[3] The Antelope, 10 Wheat. 66.

[4] *Infra*, §§ 280–452.

[5] In December, 1841, Austria, Prussia, and Russia, states which had previously taken no action in this relation, entered into a convention making the slave trade piracy.

[6] See, to this effect, Heffter, § 32 Phillimore, op. cit., 406 *et seq.*

prisoners of war, provided they are treated in conformity with the conditions of military law.[1]

§ 182. It is also settled that slaves, on reaching a non-slaveholding state, will be regarded as free, and will be released from imprisonment and discharged by the proper authorities on the making of due application.[2]

Nor slavery by non-slaveholding states.

[1] R. v. Serva, 1 Den. C. C. 104, does not necessarily conflict with the position in the text. In that case a Brazilian slaver, the Felicidada, was captured and taken possession of by officers and seamen of a British cruiser. The crew of the Felicidada rose on and killed the British officer and men having charge of the vessel. Subsequently the Felicidada was recaptured by a British vessel and the crew brought to England, where they were tried for murder. It was held by a majority of the judges that the English courts had no jurisdiction of offences committed on the Felicidada, and this can only be sustained on the ground that the slave trade is not piracy by the law of nations. But this was before the abolition of slavery in the United States and Russia, and before the stringent British statute of 1845. Brazil, also, has now by statute provided that every child born of slave parents after September 28, 1871, shall be free, and Spain has pledged itself to abolish slavery in Cuba. Phill., op. cit., 436. There is, therefore, no longer a civilized state by which slavery is avowedly tolerated.

In June, 1873, Sir Bartle Frere concluded with the sultan of Zanzibar a treaty by which the latter prohibited slavery in his territory, and Russia, in the same year, secured similar engagements from the emir of Bokhara and the khan of Khiva.

As to right of search of slaves, see *infra*, §§ 194 *et seq.*

By the constitution of the United States, as originally adopted, power was given to congress, after the expiration of the year 1808, to prohibit the importation of slaves. By the act of congress of March 2, 1807, the importation of slaves after Jan. 1, 1808, was made a criminal offence, subject to severe penalties, which were increased, and the prohibition extended by the acts of April 20, 1818, and May 15, 1820.

The position taken by Sir W. Scott, in the Amedie, 1 Acton, P. C. 240, is that English tribunals will hold the slave trade illegal when prohibited by the municipal laws of the country to which the parties belonged, but not otherwise. And in the Diana, 1 Dods. 95, where a Swedish vessel, carrying slaves from Africa to the West Indies, Sweden not having then prohibited the slave trade, was captured by a British cruiser, she was restored to the owner on the above ground. In The Louis, 2 Dods. 210, as above stated, it was further decided that the right of visitation and search, on the African seas, did not exist in time of peace, unless as between nations authorizing by treaty such right. See Buron *v.* Denman, 2 Exch. 167; rev. 8 C. B., N. S., 861; Madrose *v.* Willes, 3 B. &. Ald. 353.

[2] The Negro Case, 20 How. St. Tr. 82, and other cases cited; Phill., op. cit., 334. "The state of slavery," said Judge Story, long before the late civil war, "will not be recognized in any country whose institutions and polity

IX. Right to Sea and River.

Open sea free to all nations.

§ 185. It is now settled that the open sea is free to all nations; but that this freedom is to nations as such, and not to individuals stripping themselves of their nationality. On the one side, all persons and property sailing under a particular flag ought, as we shall presently see, to be as free from molestation as if they were on the soil of the state which the flag represents. On the other side, this privilege is not extended to individuals not authorized to carry particular national flags. A ship traversing the seas on its own mission of good or evil may be spoken, and, if it does not bear the flag of any sovereign acknowledged as such, may be seized and brought to a prize court to determine the legality of its cruise.—So far as concerns the rules of the sea, many points have been settled by treaty; others by the usage of seafaring nations. It is properly suggested by Holtzendorff, also, that, in respect to sub-marine telegraphs, rules should be adopted by treaty; and that by treaty, also, limitations should be placed on the excessive and wanton destruction of young fish and seal.[1]—By the treaty of Constantinople, in 1809, between Russia, England, and the Porte, the strait of the Dardanelles was constituted a *mare clausum* under the control of the Porte. This rule was ratified by the five great European powers in the treaty of the Dardanelles, July 10, 1841, and in 1878 was referred to as binding in the treaty of Berlin. How far the stretches of sea that are between the capes on the Atlantic coast are part of the territorial waters of the United States will be hereafter discussed.[2] Whether a title to exclusive use of fisheries or of navigation on the open sea may be inferred from a tacit convention with

prohibit slavery." Story, Conf. of Laws, p. 97. As to abolition of slavery, see *supra*, § 20; *infra*, §§ 584 *et seq.*

[1] Holtzen., *ut supra*, 1220, citing Ortolan, Règles internat., 2d ed., 1853; Bischoff, Grundriss eines positiven internationalen Seerechts, 1868; De Burgh, Elements of Maritime Intern. Law, 1868; Plocque, De la mer, 1870; Perels, Das internat. öffent. Seerecht, 1882, § 4.

The sources of maritime law have been already noticed, *supra*, §§ 124 *et seq.*, and are discussed in detail by Perels in the work just noticed—a work of peculiar merit.

[2] *Infra*, § 192.

other nations has been much disputed. It is affirmed by Vattel,[1] but denied by Wheaton.[2] Certainly one nation may by treaty with another nation preclude itself from fishing on or navigating certain portions of the high seas. But such a treaty cannot be inferred from mere non-user of the right; and a convention, to be binding, should be in express terms and deliberately sanctioned. The exclusive dominion by Denmark over the sound may be now regarded as abandoned.[3]

Belt of sea within cannon-shot held to be territorial.

§ 186. For some time after the introduction of cannon in marine warfare a belt of three miles, being the supposed range of a cannon-ball, was held to belong, in a qualified sense, to the territory of the adjacent state. It has been generally held that the waters within this belt are considered part of the territorial waters of the state, so far as to give the state jurisdiction of offences committed against its own subjects or property within such range, or of offences which disturb the peace of such territorial waters. Whether the English and American courts have common law jurisdiction of these waters has been discussed in another work; and how far the English statute attempting to settle the doubt is to be respected extra-territorially, is also there considered.[4] It is sufficient here to say that if the rule amounts to anything, it amounts to the assertion that every sovereign state has a right to protect itself from any offensive operations which may be undertaken from a base sufficiently near its shore to enable its shore to be molested. This is reasonable; and the effect of the rule would be to extend the belt over which police or punitive jurisdiction could be exercised for the purposes of self-defence, or revenue protection, from three to nine miles, the present extreme range of cannon-balls. But this would not authorize the interference with ships of other nations peaceably passing through such belt. All that the extension of the belt to nine miles would, in this view, effect, would be the vesting in each state of police jurisdiction over such a portion of the sea washing its coast as could be made the basis of operations against its

[1] Droit des Gens, t. i. l. i. c. xxiii.
[2] Int. Law, i. p. 228.
[3] See Phill., op. cit., i. 256.
[4] Whart. Con. of Law, 2d ed., § 818.

revenue or its shores.[1] Were it otherwise, the peace and security of a neutral coast might be disturbed by naval conflicts within the range of cannon-shot from the land, which invasion of neutral rights is in conflict with the settled rules of international law.[2] Nor is this all. Miscreants desirous of avenging themselves on parties dwelling on the shore, might escape liability by going four miles from land, and there pouring hot shot into that enemy's house; and if this were not done to gratify hatred, it might be done to levy black mail. In any view, every sovereign should be entitled to exercise defensive police jurisdiction over that portion of the sea from which as a base shot could be poured on his shores.[3]—The United States, following the precedent of Great Britain, have made it an offence to tranship foreign goods within four leagues of the coast;[4] and this has been held by the supreme court of the United States to be consistent with international law.[5] But it is argued by Sir R. Phillimore, that a statute of this class cannot be enforced against foreign states, unless by adopting a similar provision, they have incorporated it into the law of nations.[6] At the same time a state cannot

[1] The extension, says Perels (op. cit., § 5), of the line depends upon the range of cannon-shot at the particular period. It is, however, at such period the same for all coasts. To this effect is cited Martens, Précis., i. p. 144; Bluntschli, § 302; Heffter, § 75; Klüber, § 130; Ortolan, i. 153; and Schialtarella, Del Territorio, p. 8. According to Gessner, "les droits des riverains ont été augmentés par l'invention des canons rayés." As far as a state can protect itself, so far does its jurisdiction extend. (Kent, i. 29.) According to Ortolan (op. cit., i. p. 158), "La plus forte portée de canon selon le progrès commune de l'art à la chaque époque."

[2] *Infra*, § 239.

[3] "Inasmuch as cannon-shot can now be sent more than two leagues, it seems desirable to extend the territorial limits of nations accordingly. *The ground of the rule is, the margin of the sea within reach of the land forces, or from which the land can be assailed.*" (Field, Int. Code, 2d ed., § 29.)

[4] That a seizure of vessels engaged in an illegal trade is not limited to a range of three miles from shore, see Church *v.* Hubbart, 2 Cranch, 187.

[5] Church *v.* Hubbart, 2 Cranch, 187.

[6] Phill., op. cit., i. 276.

In R. *v.* Keyn (L. R. 2 Ex., § 63), the defendant was a foreigner commanding a foreign ship on a voyage from one foreign port to another; and the defendant's ship ran negligently, it was alleged, into a British ship about two miles from Dover, causing the death of a passenger on the latter ship. It was held by a majority of one of the court of crown cases reserved that the central criminal court, before

expected to permit the waters surrounding it, at least within cannon shot of the shore, to be the site of smuggling adventures, and of the illegal transfer of goods; and so far as this limit goes, it should be entitled to enforce its rights against all intruders. It would seem right, therefore, that for the two

which a conviction of manslaughter was had, had no jurisdiction, because, prior to 28 Hen. VIII., c. 15, the admiralty had no jurisdiction to try offences on board foreign ships, and that the central criminal courts, under the statute, had only jurisdiction of cases which the admiralty had prior to 28 Henry VIII. Sir R. Phillimore and Sir F. Kelly, who were members of the majority, went further and held, that consistently with international law English criminal law could not be exercised within the limits in question. A statute was consequently passed, in 1878, called the Territorial Waters Act, providing that "an offence committed by a person, whether he is or is not a subject of her majesty, on the open sea within the territorial waters of her majesty's dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship;" and it was declared in the preamble of the statute that "the rightful jurisdiction of her majesty, her heirs and successors extends, and *has always extended*, over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of her majesty's dominions, *to such a distance as is necessary for the defence and security of such dominions.*" It is, however, further provided that "the territorial waters of her majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of her majesty's dominion, *as is deemed by international law to be within the territorial sovereignty of her majesty, and for the purpose of any offence declared by this act to be within the jurisdiction of the admiral, any part of the open sea, within one marine league of the coast measured from low-water mark, shall be deemed to be open sea within the territorial waters of her majesty's dominions.*" This statute in one place apparently makes the test to consist in the protection of subjects, in another place falls back on the marine league. So far as concerns persons injured on shore, the former is on principle the test; and it may also be argued to be the test in reference to belligerent cruisers undertaking to cannonade each other within cannon shot of the shore. So far as concerns injuries at sea, inflicted by a foreigner on a subject, the question is still open. See remarks on R. v. Keyn, in Whart. Conf. of Laws, 2d ed., § 818; 2 Steph. Hist. Cr. Law, ch. xvi.; Perels, § 13.

As sustaining the views of the text, see Hautefeuille, i. 232; Calvo, i. p. 309; Azuni, i. p. 75.

The latter author pertinently remarks, in speaking of the position taken by the lord chancellor in the house of lords that the right of passage through the narrow seas was a "concession," that this right of unmolested passage rests on the principle of the freedom of the seas, provided the peace of the adjacent shore be not infringed; and he adds that the claim of Great Britain, if good as to the Strait of Dover, would be equally good as to the Strait of Gibraltar.

purposes of defence against aggression and prevention of interference with its trade, a state should have jurisdiction over the seas washing it as far as cannon shot extends.[1]

Coast-line internationally that on which batteries could be placed.

§ 187. The true coast line varies with the object for which the line is assumed. In treaties regulating fisheries the low-water line is usually taken, while the Roman law accepts the high-water line as the standard in all cases.[2] Wheaton takes a very uncertain test: that of navigability. In the English territorial waters act, the limit, as we have seen, has been placed at "low-water mark." But this has no extra-territorial force; and in view of the object of the limit it may well be argued that to the line on which a battery could be built on the shore the coast extends.[3]

§ 188. A ship, according to the preponderance of opinion, is part of the country whose flag she bears.[4] This, supposing

[1] *Infra*, §§ 239–241. This is declared to be the rule of international law in a decision of the supreme court (Obertribunal) of Prussia of Nov. 28, 1866, cited by Perels, § 5.

"It is probably safe to say," says Mr. Hall (Int. Law, 127), "that a state has the right to extend its territorial waters from time to time at its will with the now increased range of its guns; though it would undoubtedly be more satisfactory that an arrangement upon the subject should be arrived at by common consent."

[2] L. 96 pr. D. de V. S. "Litus est quousque maximus fluctus a mari pervenet." There are several other passages to the same effect.

[3] See to this effect Perels, op. cit., § 5; Bynkershoeck, De dom. maris, cap. 2. See Hudson v. Guestier, 6 Cranch, 281, overruling Rose v. Himely, 4 Cranch, 241.

[4] *Infra*, § 308. See authorities cited in Whart. Con. of Laws, § 356. This rule is extended by Sir R. Phillimore to cover a fleet at anchor. "The portion of the sea actually occupied by a fleet riding at anchor is within the dominion of the nation to which the fleet belongs, so long as it remains there; that is, for all purposes of jurisdiction over persons within the limits of the space so occupied." "This proposition," however, he continues to say, "is of course not to be considered without reference to the place of anchorage: a French fleet permitted to anchor in the Downs, or an English fleet at Cherbourg, would only have jurisdiction over the subjects of the respective countries which happened to be within the limits of temporary occupation of the water." Phill., op. cit., 291.

It is not necessary, as we shall see, to defend this position by the dangerous and unauthorized assumption that the sea on which a ship rests is part of the territory of her nation. It is sufficient to say that the sea is free to all, and that a vessel traversing it is subject only to the nation to which she belongs. Perels, § 12.

e flag to be genuine, would as much preclude the hostile
:rusion of foreigners on the ships of a nation as
e principle of territoriality precludes the hostile
trusion of foreigners on the soil of a nation.[1]

Ships protected by flag.

at this assumes the genuineness of the flag. A piratical
ssel may undoubtedly be visited, searched, and seized ;[2] and
there is any question as to the flag, this question can be
l ved by a visitation.—We must *à fortiori* reject the assump-
»n of some eminent writers, that national rights over the
s are to be extended to an area within cannon range of each
ip of such nation.[3] This fiction is as unnecessary as it is mis-
ievous. It is unnecessary, since the absolute freedom of a

Supra, § 146.

Infra, §§ 194 *et seq.*

ıs sustaining the position in the
t may be cited Vattel, ii. p. 80;
ıtefeuille, ii. 287; Heffter, § 78;
ntschli, § 317.

Ir. Webster, writing to Lord Ash-
ton, August 8, 1842, says : "Every
-chant vessel on the seas is right-
y considered as part of the territory
vhich it belongs. The entry, there-
r, into such vessel, being neutral,
a belligerent, is an act of force, and
rima facie a wrong, a trespass which
be justified only when done for
ıe purpose allowed to form a suffi-
ıt justification by the law of na-
ıs."

Ir. Field, in his International Code,
)9, states the rule as follows : "The
ra-territorial jurisdiction of a na-
ı, exclusive or concurrent, extends
r the following places :—

· 1. All the land or water included
hin the lines of its fleets or armies,
lusive in respect to its own mem-
s, and concurrent with that of the
ion owning the territory, in respect
members of that or of any other na-
ı.

' 2. All ships bearing its national
racter, exclusive except in the case
of a private ship within the limits of another nation, and in that case, concurrent with such nation."

"A vessel at sea is considered as part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality. All on board are endowed and subject accordingly." Swayne, J., Wilson *v.* McNamee, 102 U. S. 572; S. P., Maclachlan, Merch. Ship., 3d ed., 64, 65, 140.

"If the decks of our whole shipping were measured, it would be found that many acres of England are continually afloat; and of the whole area of England, including the towns, these acres are unquestionably the most valuable, and probably the most populous. The mere fact of their being afloat, so long as they float, either on English waters or on the high seas, which are the common property of all nations, can obviously have no effect on their jural character. An English ship and its crew, in such circumstances, is as much under the local jurisdiction of England as if it were lying in a London dock." Lorimer, Law of Nations, 253.

[3] See to this effect De Cussy, i. 147; Bluntschli, § 318.

ship from the claim of any other nation than that to wl she belongs, follows from the very fact of the openness of sea to all legitimate visitors; and it is mischievous bec (1) it assumes that the sea may become territorial prope and (2) it may lead, if it be admitted to its full exten conflicts between vessels of different nationalities, when ing or anchored within cannon shot of each other; conf not only as to their rights of navigation, but as to their ri of fishing.[1]—The prerogative of inviolability does not ex to ships which, in a period of war, are fitted out in viola of neutrality in a neutral port;[2] nor does it extend to ve which have committed depredations on shore, and which l been pursued over the territorial limit;[3] nor, as we shall sently see, does it extend to pirates.

Exception as to territorial waters.

§ 189. Merchant vessels, however, are so far subject to law of the port that, if they commit any breacl the port law, they are liable to the port authorit and if a subject of the state to which the port longs is unlawfully detained in one of such ves a *habeas corpus* lies for his release, if the vessel is within territorial jurisdiction of the court issuing the writ.[4]— important distinction, however, is taken between miscon whose effects are confined to the vessel in which it t place, the parties concerned being all connected with vessel, and offences which disturb the peace of the port, c which one at least of the parties is not connected with vessel. The latter are subject to the law of the port; former not.[5] The exception has been extended to all t torial waters;[6] and this is undoubtedly correct if the ol of the exception be to preclude foreign vessels within t territorial waters from disturbing the peace of the shor interfering with the revenue laws of the mainland.[7]

[1] This view is more fully illustrated by Perels, § 6.

[2] Phill., op. cit., i. 481; Vattel, I. i. c. xix. s. 216.

[3] Heffter, § 80; Bluntschli, § 342.

[4] 1 Op. Atty.-Gen. U. S., 25, 55; this is sustained by Sir R. Phillimore, op. cit., i. 482.

[5] Wh. Con. of Laws, §§ 357, see Phill., op. cit., i. 485 *et seq.*; rence, iii. 435.

[6] Perels, § 13.

[7] See *supra*, § 186. The Englis as to territorial waters is discuss 2 Steph. Hist. Cr. Law, ch. xvi.

treaties with China, Japan, and Turkey, these countries give consuls of civilized states jurisdiction over the ships of such states wherever such ships may be.[1]

§ 190. The sovereignty of the flag of foreign ships of war is not only conceded in England, where the rule in respect to merchant ships is sometimes contested, but it is held to apply to port as well as at sea. The rule, says Judge Story, in an opinion adopted by Sir R. Phillimore,[2] is not founded on any notion that a foreign sovereign has an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign when it comes within his territory; for that would be to give a sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into home ports and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. "But as such consent and license are implied only from the general usage of nations, they may be withdrawn upon notice at any time without just offence; and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as are other vessels." But, unless withdrawn, it is presumed to be conceded. And it is now settled that foreign ships of war and boats, the particular property of a foreign sovereign, are not liable to process, though the ships or boats be at the time of the cause of action on the territorial waters of the state of process.[3]—A state, it should be added, is internationally entitled to exclude from its ports the ships of war of other nations, or to limit their stay; and this right has been exercised by neutral states as to belligerent cruisers.[4] When such a foreign ship is per-

Ships of war.

[1] *Supra*, § 147.

[2] Santissima Trinidad, 7 Wheat. 283, cited Phill., op. cit., 477; see Hall, Int. Law, 164.

[3] A ship of war was held exempt from admiralty process for salvage in The Constitution, L. R. 4 P. D. 39. Extra-territoriality was held to be extended in such cases to packet boats, the property of foreign sovereigns, The Parlement Belge, L. R. 4 P. D. 129; 5 P. D. 197; see The Pizarro, 10 N. Y. Leg. Ob. 97.

[4] Twiss, i. § 158; Wheaton, i. 124; Perels, § 14. As to invasion of neutral waters, see *infra*, § 239.

mitted to enter a port, it is totally exempt, while in such port, from the operation of the police of the mainland. The qualified jurisdiction exerted by the territorial authorities over merchant ships cannot be exerted over ships of war.[1] If there is misconduct on the part of a foreign ship of war in a harbor, she can be ordered out, and this without any breach of international courtesy.[2] Even the officers and marines of a foreign ship of war, when permitted to visit the shore on service, have been held to be exempted from territorial jurisdiction. But this applies only to cases where the foreigners confine themselves to their duty in the part of the territory they are permitted to visit. If permission be refused, the exemption ceases. And they may be punished, when this is necessary, under the laws of self-defence.[3]—From the position of the absolute extra-territoriality of ships of war, their right, at the discretion of their commanders, to render an asylum to fugitives from the shore logically flows; and this has been emphatically declared by the British government in reference to fugitive slaves, whom it has declined to surrender. The same view would be applicable to political fugitives. But it would be a gross impropriety for the commander of a foreign ship of war in a harbor to refuse to surrender an ordinary criminal, not a political refugee, to the authorities of the shore.[4]

Navigable rivers should be open to all nations.

§ 191. The congress of Vienna adopted a resolution to the effect that the free use of the Rhine and its tributaries should be given to all nations whose territory it at any point washes. The same rule was adopted in respect to the Danube by the Paris treaty of 1856, and by the treaty of Berlin of 1878; and in South America in respect to the La Plata. The better view is, that all navigable rivers should be open without toll to ships of all nations, subject to police control, and to such limitations, in times of war, as are proper as war measures. When a river is entirely

[1] Phill., § 344; Sir W. Harcourt in Times of Nov. 4, 1875; Twiss, i. § 158; Heffter, § 79; Perels, § 14; Bluntschli, § 321.

[2] The absolute extra-territoriality of ships of war is also maintained by Ortolan, i. 178. The authorities are carefully examined by Perels, § 14.

[3] Perels, *ut supra*; Foelix, § 547.

[4] See authorities collected in Perels, § 14, viii.

in the territory of a particular state, then the public control of the entire river and jurisdiction of offences committed on it, belong properly to such state.[1] By the treaty of Versailles, of 1783, by which the independence of the United States was recognized, it was provided in article 8, that "the navigation of the river Mississippi shall forever remain free and open to the subjects of Great Britain, and the citizens of the United States." But the United States having purchased Louisiana, on April 30, 1803, from France, and Florida from Spain, on February 22, 1819, acquired possession of the banks on both sides of the Mississippi. and the treaty of Ghent, of December 24, 1814, no doubt for this reason, omitted all reference to the rights of British subjects to the navigation of the river. Since then the exclusive control of the river by the United States, so far as concerns foreign states, has been conceded internationally;[2] though, subject to police supervision, and to the right to impose pilotage and quarantine regulations, the free navigation of this and of other navigable rivers within the United States, is, by the law of nations accepted by the United States, open to all ships of foreign sovereigns. The right freely to navigate the St. Lawrence, was for many years the subject of controversy between Great Britain and the United States; the United States insisting on the right of free passage over this river, the lakes by which it is fed being in large part bounded by the United States. This right, however, was resisted by Great Britain. "It is difficult to deny," says Sir R. Phillimore,[3] "that Great Britain may have grounded her refusal upon strict law; but it is at least equally difficult to deny, first, that in so doing she put in force an extreme and hard law; secondly, that her conduct with respect to the navigation of the St. Lawrence was inconsistent with her conduct with respect to the navigation of the Mississippi. On the ground that she possessed a small tract of domain in which the Mississippi took its rise, she insisted on her right to navi-

[1] On this topic Holtzendorff, *ut supra*, 1223, cites Wurm, Briefe über die Freiheit der Flussschiffart, 1858; Caratheodory, Du droit int. concernant les grands cours d'eau, 1861; Engelhard, Du regime conventional des fleuves, 1870. As to pilotage and wharfage, see *infra*, § 424.

[2] See Phill., op. cit., i. 242.

[3] Phill. Int. Law (3d ed.) 245.

gate the entire volume of its waters; on the ground that she possessed both banks of the St. Lawrence where it disembogued itself into the sea, she denied to the United States the right to navigation, though about one-half of the waters of Lakes Ontario, Erie, Huron, and Superior, and the whole of Lake Michigan, through which the river flows, were the property of the United States." The question, however, was settled with the withdrawal, in the reciprocity treaty of June 5, 1854, of the exclusive claims of Great Britain. This treaty, it is true, ceased to exist on January 18, 1865, by action of the government of the United States, in pursuance of a right reserved in this treaty; but the exclusive navigation of the river has not since then been insisted on by Great Britain.[1]

[1] Lawrence's Wheaton, n. 114, p. 361.

As regulating rights to navigable rivers, see treaties of the United States with Argentine Confederation, 10 U. S. Stat. at L. 1005; with Mexico, ib. 1031; with Bolivia, 12 ib. 1003; with Paraguay, ib. 1091.

Mr. Field (International Code, § 55) states the rule as follows:—

"A nation, and its members, through the territories of which runs a navigable river, have the right to navigate the river to and from the high seas, even though passing through the territory of another nation, subject, however, to the right of the latter nation to make necessary or reasonable police regulations for its own peace and safety. Message of President Grant to the Congress of the United States, December, 1870; and treaties there cited."

By the Roman law a free passage is given to all parties over all navigable rivers with the use of the shore (jus littoris) for unloading cargo and anchoring vessels. (i. 1–5, Inst. ii. 1.) A distinction, however, was taken between the sea, which was "res communes" and navigable rivers, which were "res publicae." The same view was taken by Grotius (Lib. II. c. ii. § 12), but the great weight of authority since Vattel is that the state through which a river flows is to be the sole judge of the right of foreigners to the use of such river. Wheat. Int. Law, i. 229; Vattel, I. i. s. 292.

On the other hand, when the free navigation of a river is conceded, this carries with it the right to use the shores so far as this is necessary to the use of the river.—Phil., *ut sup.*, i. 225; Wheat. Hist. of Law of Nat. 510.

Lord Stowell (Twee Gebroeders, 3 Rob. Adm. 336), speaking of a claim to riparian use, said, "It is a claim which can only arise on portions of the sea, or on rivers flowing through different states; the law of rivers flowing through provinces of one state is perfectly clear. In the sea, out of the reach of cannon shot, universal use is presumed; in rivers flowing through conterminous states, a common use of the different states is presumed. Yet, in both of these, there may, by legal possibility, exist a peculiar property excluding the universal or the common use." For a recapitulation of treaties regulating the use of navigable rivers passing through several European

§ 192. An inland sea or lake belongs to the state in which it is territorially situated. As illustrations may be mentioned the inland lakes whose entire body is within the United States and the sea of Azov. Those portions of the sea which are bounded by several European states were at one time claimed to belong in common to the states by which they are bounded; but this claim is not now allowed. The fact that both shores of an arm of the sea, as in the case with Magellan's Straits, have, subsequent to its adoption as a public highway, been under the possession of a single power, does not change its public character. Nor, it is now finally settled, can a strait which separates two or more countries (*e g.*, the British Channel or the Sound) be placed under their joint control, so as to put other countries at a disadvantage. A distinctive rule has been adopted in reference to the Dardanelles and the Bosphorus, which, even in times of peace, are closed to the ships of war of all European nations, a rule only deviated from in cases of peculiar courtesy. Since 1871, the merchant ships of all nations have equal rights on the Black Sea.[1]—As inland seas may be enumerated the Thracian Bosphorus, belonging to the Turkish empire, and Long Island Sound. In the same category are to be placed the channels forming the entrance to the Baltic, so long as both sides remained under the sovereignty of Denmark. But although sovereignty may be claimed over such straits so as to give such police jurisdiction over offences committed on them as heretofore existed,[2] vessels navigating the high seas cannot be precluded from passing through them. We are told, indeed, by Sir R. Phillimore that the British crown has an

Inland seas territorial.

states, see Phillimore, op. cit., 228 *et seq.* That nations which are separated by a navigable river have each jurisdiction to the middle of the stream, see The Fame, 3 Mason, 147; *supra*, §§ 22, 23.

[1] Holtzendorff, *ut supra*, 1222, referring to Twiss's "Territorial Waters" in the Nautical Magazine, 1878; Stork, Jurisdiktion in Küstengewässern.

Under the treaty of Paris of 1856, the Black Sea is neutralized, and by a subsequent convention Russia and Turkey limited their naval force on the Black Sea. By a treaty of March 13, 1871, it is provided that "the Black Sea remains open, as heretofore, to the mercantile marine of all nations." For a specification of treaties referring to Turkey and the Black Sea, see Phill., op. cit., 295 *et seq.*

[2] *Supra*, § 186.

exclusive right to the Bristol Channel between Ireland and Great Britain, and to the channel between Scotland and Ireland.[1] But Perels, in the able work already referred to,[2] says, after repeating this statement, that this supposed supremacy is incontested only among English publicists, and is elsewhere denied. To the same general effect writes President Woolsey.[3]—Great Britain, also, has "immemorially claimed and exercised exclusive property and jurisdiction," says Sir R. Phillimore, "over the bays or portions of the sea cut off by lines drawn from one promontory to another, and called the *King's Chambers*. . . . In time of war, at least, the Solent, or the portion of the sea which flows between the Isle of Wight and the mainland, might, I think, be justly asserted to belong, as completely as the soil of the adjacent shores, to Great Britain."[4] Chancellor Kent, in discussing the above questions, maintains that, "considering the great extent of the line of the American coast, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable," he further argues, "to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of Delaware, and from the south cape of Florida to the Mississippi. . . . It ought, at least, to be insisted, that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within 'the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another.'"[5] But this extension of maritime jurisdiction "for domestic purposes connected with our safety and welfare" over the "waters on our coasts," "though included

[1] Op. cit., i. § 189.
[2] Perels, § 5, p. 40.
[3] Int. Law, § 56.
[4] Phill., *ut sup.*, i. 285.
[5] On this question may be studied the arguments delivered in 1877 before the Halifax commissioners under the treaty of Washington.

within lines stretching from quite distant headlands," is thus commented on by Dr. Woolsey: "Such broad claims have not, it is believed, been much urged, and they are out of character for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of the more recent times."[1] It would seem more proper to adopt the test of cannon shot heretofore given, and that of capacity to smuggle by ship's boats, as already stated;[2] and to say that a nation should have such police jurisdiction as may be necessary for the purpose of warding off attack from marauders and smugglers, and for the purpose of precluding annoyance to the shore from naval conflicts by belligerent cruisers. This virtually coincides with the test of defensibility from the shore, which would, in case of waters whose headlands belong to the same sovereign, exclude all bays more than eighteen miles in diameter, assuming the range of cannon-shot to be nine miles. But this should be made to yield to usage. If a particular nation has exercised dominion over a bay, and this has been acquiesced in by other nations, then the bay is to be regarded as belonging to such nation.[3]

X. Right of Search and Condemnation.

§ 194. The right of a war ship to compulsorily visit and search a merchant ship may be viewed (1) as a right to be exercised in peace; (2) as a right to be exercised in war. As a right to be exercised in peace it cannot be conceded without placing the control of the high seas in the hands of the state which has a preponderance of naval power. If the right can be exercised in one case, it can be exercised in all cases, and the position that the flag of a nation protects its shipping from intrusion would be set at naught.[4] There is no merchant ship, if this right be conceded, that would not be liable to be stopped on the high seas and subjected to the annoyance and damage of having its papers searched by an armed cruiser; and not only would the

Right of search not to be conceded in peace.

[1] Woolsey's Int. Law, § 56.

[2] *Supra*, §§ 186 *et seq.*

[3] See arguments of Lord Blackburn in Direct. U. S. Cable Co. *v.* Anglo-Am. Tel. Co., L. R. 2 Ap. Ca. 419, cited Phill., op. cit., 290.

[4] As to the policy of the United States in this respect, see *infra*, § 242.

commerce of states which do not maintain a large navy be at the mercy of the power whose navy rules the seas, but innumerable provocations to war would be given. It is said that this prerogative is essential to clear the seas of pirates. But the prerogative is an impertinent intrusion on the privacy of individuals as well as on the territory of the state whose domains are thus invaded; and the evil of sustaining such a prerogative is far greater than the evil of permitting a pirate for a few hours to carry a simulated flag. Pirates, in the present condition of the seas, have been very rarely arrested when setting up this simulation. They are now, in the few cases in which they appear, readily tracked by other means; and the fact that in some instances they are caught when carrying a false flag no more sustains the right of general search of merchant shipping than would the fact that conspirators sometimes carry false papers justify the police in seizing every business man whom they meet and searching his correspondence. In the very rare cases in which an apparent pirate is seized and searched on the high seas under a mistake, the vessel being a merchant ship, the defence must be, not prerogative, but necessity, only to be justified on the grounds on which is justified an assault made on apparent, but unreal cause.[1]—It may be added that basing the right to search a vessel on the assumption of piracy is a *petitio principii*, equivalent to saying that the vessel is to be searched because she is a pirate, when it is for the purpose of determining whether she is a pirate, that she is searched. The searching, as is the case on issuing a search warrant in an ordinary criminal practice, should be at the risk of the party searching, and only on probable cause first shown; not for the purpose of inquiring whether there is probable cause.[2]—The right of British cruisers to search a foreign vessel for British sailors was claimed by the British government prior to the war of 1812 between

[1] See to this effect Gessner, 12th ed., 303; Kaltenborn, Seerecht, ii. p. 350; Wheaton, Right of Visitation, London, 1842; see to the contrary Phillimore iii. pp. 147–8; Heffter, 164; Calvo, ii. p. 656. Ortolan holds that the function is to be exercised at the risk of the visiting cruiser as an extra-legal prerogative. Ortolan, iii. 258.

[2] See *infra*, § 200. As to neutral rights, see *infra*, § 236.

Great Britain and the United States. The right was not abandoned by Great Britain at Ghent, but it has never since been exercised. It is now virtually surrendered.[1] "I cannot think," says Sir R. Phillimore,[2] "that the claim of Great Britain was founded on international law. In my opinion it was not."—The right to visit and search on certain conditions has frequently, it should be added, been given by treaty, in which case it is determined by the limitations imposed by the contracting states.[3]—Independent of the right of search, a ship, whether public or private, has a right to approach another on the high seas, if it can, and to hail or speak it, and require it to show its colors; the approaching ship first showing its own.[4]

[1] See correspondence between Lord Ashburton and Mr. Webster—Wheat. Hist. Int. Law, 737.

[2] Phill., op. cit. (1879), 445.

[3] See Specifications in Gessner, 12th ed., 305; and see *infra*, § 242.

[4] Ortolan, Rég. Int. et Dip. de la Mer, 233, etc., Field's Int. Code, § 62.

By the slave trade treaty of May 20, 1862, between the United States and Great Britain, the right of police search for ten years was granted to Great Britain over the whole coast of Cuba, to a distance of thirty leagues from shore. This concession made by Mr. Seward probably without considering the consequences, not only recognized a right of search in times of peace, but extended this right to our own coast, the Keys of Florida being within thirty leagues from Point Yeacos or Mantanzas. It appears from a letter of Mr. Perry, minister at Madrid (U. S. Diplom. Cor., 1862, p. 509), that the Spanish minister expressed surprise that the United States, "after combating the principle so long," "should have yielded now a right so exceedingly liable to be abused in practice;" and this surprise may still be expressed elsewhere than in Spain. There is now no question that this concession was as hasty as it was ill-judged; but if it be pressed as proof of the abandonment of opposition to the right of search by the United States, the following replies may be made:—

(1) The treaty was the result of a proposal made by Mr. Seward at the height of the late civil war, shortly after the Trent complication, and, being on its face limited to ten years, may be regarded as part of a system of provisional settlement with Great Britain of the disputes arising from the civil war. The very fact of its temporary character precludes it from being an authority after the period prescribed by its own limitations.

(2) After the period so designated has been reached, we fall back on an unbroken line of authorities to the effect that the concession of this right to Great Britain is incompatible with our traditions and our interests.

When Mr. Wilberforce, in 1818, suggested such a concession to Mr. J. Q. Adams, the answer was: "my countrymen will never assent to such an arrangement." A convention to this effect signed by Mr. Rush and Sir

§ 195. What has just been said refers exclusively to the right of search during peace. The right, on the other hand, of a belligerent cruiser, in times of war, to visit and search neutral merchantmen for goods contraband of war, is conceded on all sides, oppressive as is this right to neutrals, and undue as is the advantage it may give to the belligerent with superior naval power.[1]

Otherwise as to belligerents during war.

§ 195 *b*. The right must be regarded as limited as follows:—

(1) No neutral ship should be searched on its way between two neutral ports.

Search in war.

(2) The right can only be exercised by a belligerent while war is actually raging.

(3) It cannot be exercised within the territorial waters of a neutral state.

(4) It must be exercised by the commanding officer[2] of the

Stratford Canning was amended by the United States Senate, so as to be inapplicable to the American coasts, and was then rejected by England. General Jackson, in 1834, through the then secretary of state, informed Sir Charles Vaughan, the English minister, that "the United States were resolved never to be a party to any convention on this subject." Mr. Webster, in a despatch to General Cass, declared, in terms the most solemn, that our government would not "concur in measures which, for whatever benevolent purposes they may be adopted, or with whatever care or moderation they may be exercised, have a tendency to place the police of the seas in the hands of a single power." See Lawrence's Right of Visitation and Search, 94–117; Diplomatic Hist. of the War, 1884, pp. 13, 52, 419. And Mr. Webster, when secretary of state in 1851, said: "I cannot bring myself to believe that those governments (England and France), or either of them, would dare to search an American merchantman on the high seas, to ascertain whether individuals may be on board bound to Cuba, and with hostile purposes." Priv. Cor., p. 477.

[1] See Heffter, § 168; Bluntschli, § 819; Phillmore, iii. § 325; Perels, § 53. In the Trent case, the right of a belligerent to arrest and remove from a neutral ship diplomatic agents sent by the opposing belligerent to the state to which the agents were sent, came into question. See *infra*, § 228; *supra*, § 165.

[2] Mr. Hall sums up the duties of a captor as follows (p. 652):—

(1) He must conduct his visit and capture with as much regard for persons and for the safety of property as the necessities of the case may allow.

(2) He must bring in the captured property for adjudication, and use all reasonable speed in doing so. "Destruction involves compensation." The Zee Star, 4 Rob. Ad. 71; The Leucade, Spinks, 217.

(3) The captor, in bringing in the vessel, must use due care, and is liable for damages his want of care causes. As to general policy in respect to search, see *infra*, §§ 242 *et seq*.

igerent ship, and through the agency of an officer in uni-
n.[1]

i) It must be based on probable cause; though the fact that
i cause turned out afterwards to be a mistake, does not of
lf make the arrest wrongful.[2]

i) Contraband goods cannot be seized and appropriated by
captor. His duty is to take the vessel into a prize court,
whom the question is to be determined.[3]

7) Supposing the right exists, a belligerent cruiser is jus-
ed in enforcing it by all means in his power.[4]

3) In case of violent resistance to a legitimate visitation,
vessel so resisting may be open to condemnation by a
ze court as prize. But this is not the case with mere
empt at flight. And there should be no condemnation of
eutral vessel whose officers, having no reasonable ground to
ieve in the existence of the war, resisted search.[5]

9) The right of search, so it is held by the powers of con-
ental Europe, is not to be extended to neutral ships sailing
ler the convoy of a war ship of the same nation. This
w, however, has not been accepted by Great Britain.[6] But
any view, the commanding officer of the convoy must give
urance that the suspected vessel is of his nationality, under
charge, and has no contraband articles on board.[7]—The
glish admiralty have gone so far as to hold that when a

Lushington, Prize Law, § 25.

As to what constitutes probable
e, see Lushington's Prize Law,
.

As to what is contraband, see
, §§ 226, 238, 240.

See Holtzendorff, *ut supra*, 1254;
ence on Visitation and Search,
.

hill., iii. §§ 366 ff; Wildman, ii.
Field's Code Int. Law, § 871.

erels, § 56; Ortolan, ii. 272 ff;
essner, 12th ed., 318.

When a neutral merchant ship is
r convoy of an armed public neu-
ship, it is not subject, according
ie rule adopted in Italy, and in
cases recognized by treaty, to visitation, when the commander of the convoy gives verbal assurance that the ship in question is a ship of his nation, and is not liable to search. Lushington, Prize Law, Int., viii., note; Field's Code of Int. Law, § 866.

Twiss (Law of Nations, Part II., § 96) maintains it to be a clear maxim of law that "a neutral vessel is bound, in relation to her commerce, to submit to the belligerent right of search." It is not competent, therefore, he insists, for a neutral merchant to exempt his vessel from the belligerent right of search, by placing it under the convoy of a neutral or enemy's man-of-war. See Kent's Com., i. 154.

fleet of Swedish merchantmen was sailing under convoy of a Swedish ship of war, and the convoying ship resisted, under order of the Swedish government, search instituted by British cruisers, this justified the condemnation of the whole fleet. The resistance of the convoy, so it was held, was the resistance of all the ships convoyed.[1] This doctrine has been sustained by an opinion of the supreme court of the United States, so far as it implies a right in a belligerent to search for contraband of war, but not for subjects or seamen.[2]—If a vessel is captured without probable cause, damages may be had from the captor.[3]

(10) The right to visit involves the right to detain for the purpose of visitation.[4]

(11) The falsification of papers by a merchant ship, searched by a belligerent, gives strong ground for condemnation;[5] though this presumption may be overcome by proof of acci-

[1] The Maria, 1 Rob. Ad. 340; The Elsabe, 4 Rob. Ad. 408.

[2] The Nereide, 9 Cranch, 388, 428; The Marianna Flora, 11 Wheat. 2.

[3] The Ostsee, 9 Moore, P. C. 150; The Maria, 11 Moore, P. C. 271; The Thompson, 3 Wall. 155; The Dashing Wave, 5 Wall. 170.

In Lushington's Prize Law, §§ 124–163, as adopted in Field's Code of Int. Law, § 879, it is stated that a private ship may be detained by a belligerent on the following grounds of suspicion, if not explained to the satisfaction of the commander:—

1. Carrying no passport or proper license.

2. "Carrying any false or simulated passport or other papers affecting the character of the ship, contents, or voyage, such as certificate of registry, sea letter, charter-party, logs, builder's contract, bill of sale, bills of lading, invoices, manifest, clearance, muster-roll, shipping articles, bill of health, etc.

3. "Carrying papers which, in any respect material to the question of contraband, are inconsistent with each other, or with the declarations of the master to the visiting officer.

4. "Withholding from the visiting officer any papers material to the character of the ship, contents, or voyage.

5. "Spoliation of papers of any kind, that were on board the ship.

The commander of a visiting ship is responsible in damages for the wrongful acts of all under his command, whether he himself be present or absent, when they are committed. He is not exonerated by being under a superior officer, unless the latter was actually present and co-operating, or issued express orders to do the act in question." Field's Code Int. Law, § 888, citing Lushington's Naval Prize Law, § 7; The Mentor, 1 Rob. Ad. 179; The Diligentia, 1 Dodson, 404; The Acteon, 2 id. 48; The Eleanor, 2 Wheaton, 345.

[4] Lushington, Prize Law, § 53.

[5] The Hunter, 1 Dods. 480.

dent or sudden terror.[1] And even throwing papers overboard is open to explanation, and, without other proof, does not conclusively show that the cargo was enemy's property.[2]

[1] The Pizarro, 2 Wheat. 227.

[2] 1 Kent's Com., 158, Holmes's Note, citing The Ella Warley, Blatch. Pr. 204, and other cases in same volume; The Johanna Emilie, Spink's Prize C. 12. And see remarks by Mansfield, C. J., in Bernardi *v.* Motteux, Dougl. 581. "The right of search," according to Dr. Woolsey (Int. Law, § 190), "is by its nature confined within narrow limits, for it is merely a method of ascertaining that certain specific violations of right are not taking place, and would otherwise be a great violation itself of the freedom of passage on the common pathway of nations. In the first place, it is only a war right. The single exception to this is spoken of in § 194, viz., that a nation may lawfully send a cruiser in pursuit of a vessel which has left its port under suspicion of having committed a fraud upon its revenue laws, or some other crime. This is merely the continuation of a pursuit beyond the limits of maritime jurisdiction with the examination conducted outside of these bounds, which, but for the flight of the ship, might have been conducted within. In the second place, it is applicable to merchant ships alone. Vessels of war, pertaining to the neutral, are exempt from its exercise, both because they are not wont to convey goods, and because they are, as a part of the power of the state, entitled to confidence and respect. If a neutral state allowed or required its armed vessels to engage in an unlawful trade, the remedy would have to be applied to the state itself. To all this we must add that a vessel in ignorance of the public character of another, for instance, suspecting it to be a piratical ship, may without guilt require it to lie to, but the moment the mistake is discovered, all proceedings must cease. (§§ 54, 195.) In the third place, the right of search must be exerted in such a way as to attain its object, and nothing more. Any injury done to the neutral vessel or to its cargo, any oppressive or insulting conduct during the search, may be good ground for a suit in the court to which the cruiser is amenable, or even for interference on the part of the neutral state to which the vessel belongs."

Mr. Seward, in his letter to Lord Lyons of December 26, 1861 (on the Trent case), says: "Whatever disputes have existed concerning a right of visitation or search in times of peace, none, it is supposed, has existed in modern times about the right of a belligerent in time of war to capture contraband in neutral and even friendly merchant vessels, and of the right of visitation and search, in order to determine whether they are neutral and are documented as such according to the law of nations."

According to Mr. Field:—

"No ship is subject to visitation by a ship of another nation, except in the following cases:—

"1. A private or other unarmed ship within the territorial limits of the nation by whose public ship the visitation is made;

"2. On the high seas, in the cases provided in the next article.

"Ortolan, above cited; Fiore, Nouv. Dr. Int., vol. ii. p. 489, etc. See Lawrence's Wheaton, pt. iv. ch. iii. § 18.

"The territorial limits would be extended by article 28 to three marine leagues; and it does not seem necessary

§ 196. When a vessel is seized as a prize the following rules should be observed:—

Vessel seized should be taken to prize court.

(1) Peculiar care should be taken of ship and cargo, and the ship's papers placed in custody so that they may not be tampered with. They should be placed under seal, being first attested by the signature of the proper officer of the captured ship.[1]

(2) An officer, with a suitable crew, should be detached and placed in command of the prize, to be taken to a home or other friendly port.

(3) When in port perishable goods may be at once sold; and so of a prize ship incapable of repair, the proceeds to await the determination of the suit.

(4) The destruction of the prize ship is only permitted when she could not be brought to port without great danger, or when by retaining the prize the safety of the captor would be imperilled.[2]

(5) Unless otherwise provided by treaty, the proper court to determine the validity of a capture is a prize court appointed

to recognize the right of pursuit beyond that distance.

"The effect of these rules would be to require ships to show their true colors at sea, and to allow armed ships to visit in case of a breach of this rule, confining the visitation, however, to the purpose of ascertaining the character of the offender, and his identity. See the subject discussed in Ortolan, Régles Int. et Dipl. de la Mer, vol. i. p. 233, etc.

"Visitation in time of war is provided for in book second.

"If a private or other armed ship, being upon the high seas, not under convoy of an armed ship of its nation, does not show its colors in response to an armed ship of another nation duly requiring it, or if there be probable cause for believing that it shows false colors with intent to mislead an armed ship of another nation, it may be compelled to submit to visitation.

"The presence of the convoying ship is a sufficient assurance of nationality, Wildman, Int. Law, vol. ii. p. 121. Perhaps this should be extended to armed ships; and if so, the clause as to convoy should be omitted." Field's Code of Int. Law, §§ 64–65.

[1] The captor must send in as witnesses to the prize court such persons from the captured vessel as may explain the case most fully. See Act of Congress of June 30, 1864, § 1; Field's Code Int. Law, § 878. It is the duty of the captors, immediately upon arrival in port, to deliver, upon oath, all the papers of the captured vessel into the registry of the prize court. The Diana, 2 Gall. 93; see Jecker v. Montgomery, 13 How, 498; S. C., 18 How. 111; The Sir William Peel, 5 Wallace, 517; The Falcon, Bl. Pr. Ca. 52.

[2] Perels, § 157; Lushington, Prize Law, §§ 90, 96.

y the captor's state; and the establishment of international rize courts, though very desirable, can only be effected by reaty, and would probably be attended by many complications.

(6) Prize courts of neutral states may adjudicate prize questions brought before them, provided the same rights be given o each belligerent.[1]

(7) The proceedings are to be in conformity with the practice of the court of trial, but in subordination to the settled ules in this respect of international law.[2]

(8) The taking to the prize court should be prompt, though *bona fide* delay in this respect, caused by the peculiar conditions of the case, does not expose the captor to liability as a respasser.[3]

(9) The prize court must be the court of the sovereign of the captor sitting in his territory or in the territory of his ally. "The prize court of an ally cannot condemn. Prize or no prize is a question belonging exclusively to the courts of the country of the captor."[4] But a prize court may take jurisdiction over prizes lying in a neutral port,[5] and of property captured on a vessel although such vessel was not brought under its cognizance.[6]

[1] Ortolan, ii. p. 309; Perels, § 58.

[2] Perels, § 59: That captures at sea belong primarily to the sovereign, and the proceeds are to be distributed, after due condemnation by a prize court, according to the laws imposed by such sovereign, see The Banda Booty, L. R. 1 Ad. & Ec. 109; The Siren, 7 Wall. 152, and other cases cited; 1 Kent's Com. (Holmes's Note), 102.

[3] Jecker *v.* Montgomery, 18 How. 11; Fay *v.* Montgomery, 1 Curtis, 366.

[4] 1 Kent's Com. 104, citing Havelock Rockwood, 8 T. R. 268; Oddy *v.* orill, 2 East, 475; Glass *v.* Sloop etsey, 3 Dallas, 6.

[5] The Herstelder, 1 Rob. Ad. 114; udson *v.* Guestier, 4 Cranch, 293; 'illiams *v.* Armroyd, 7 Cranch, 423; see Jecker *v.* Montgomery, 13 How. 498; The Arabella, 2 Gall. 368.

Vessels engaged in the fisheries are, by international law, according to the preponderance of opinion, exempt from capture. See Martin's Precis, § 322.

[6] The Advocate, Blatch. Pr. Ca. 142, and other cases in same volume.

The legislation of the United States in reference to prizes is to be found in the following statutes:—

1. Act in respect to right of salvage in case of reprisals, March 3, 1800.

2. Supplementary act of Jan. 27, 1813.

3. Act simplifying process of seizure, March 25, 1862.

4. Sections 2, 6, and 12 of the act

Prize courts should be strictly impartial and keep full records.

§ 197. Judges of prize courts should remember that, though appointed by the sovereign by whose officers the capture was made, their duties are those of arbiters of international issues, as to which their minds should be kept clear of the influence of national interest. Aside from this prejudice, the natural tendency of judges to extend their jurisdiction tempts prize judges to add new links to the chain of precedents by which the rights of belligerents, as distinguished from those of neutrals, are maintained. Such temptations should be rigorously repelled. It should be considered that the costs and delays, in a practice moulded by belligerents in their conflicts with neutrals, are so ruinous that it in most cases would have been better for the neutral had his goods been captured and appropriated without condemnation, than that they should be condemned and then appropriated.[1] And it should be chiefly kept in mind that it is agreed by all civilized nations that it is the duty of a prize judge to follow, not the policy which may seem for the moment best for his country, but the

of July 17, 1862, in reference to the U. S. Navy.

5. Act regulating prize procedure, March 3, 1863.

6. Act regulating prize procedure and distribution, 1864.

This legislation is classified and translated in the report of M. Bulmerincq on Maritime Prizes, Ghent, 1860.

In the United States it is settled that there is to be no recognition of the jurisdiction of neutral ports in prize cases. See Kaltenborn Seerecht, ii. 389, in which work the jurisdiction and procedure of the prize courts of the United States are detailed with general accuracy. The district court is in this work spoken of as the court of the first instance, the circuit court as the court of the second instance. In a learned disquisition on the same topic by Martitz, under the title of "Prisengerichte," the supreme court of the United States is referred to as the court of the third instance, and at the same time as the court of the last resort.

Mr. Seward, in his letter to Lord Lyons, of Dec. 26, 1861, agreeing to the surrender of Messrs. Mason and Slidell, accepts as binding the following passage from a letter of Mr. Madison, when secretary of state, to Mr. Monroe, minister in England: "Whenever property found in a neutral vessel is supposed to be liable on any ground to capture and condemnation, the rule in all cases is, that the question shall not be decided by the captor, but be carried before a legal tribunal, where a regular trial may be had, and where the captor himself is liable to damages for an abuse of his power."

[1] See this strongly set forth by Holtzendorff, *ut supra*, 1255, citing Dea[illegible] on Neutrals, 1852; Katchinowski, Prize Law, 1866; Barboux, Jurisprudence du conseil des prizes, 1868.

law which such civilized nations have adopted as a system by which they are all to be bound.[1]—A judgment of a prize court sustaining the validity of a capture must contain or be accompanied by a statement of the grounds on which it is founded.[2]

XI. Piracy and Privateering.

§ 200. Piracy is agreed on all sides to be an offence by the law of nations, though as to what piracy is all states resort to their own particular law to determine. It is generally understood, however, that the term covers all robbery, or attempts at robbery, or other

Piracy an offence by the law of nations.

[1] Mr. Wheaton, after noticing Lord Stowell's claim to absolute superiority from national prejudice, argues that it was impossible for that eminent judge to divest himself of principles necessary to the development of a great maritime nation such as England. (Wheat. Hist. 711.) On the other hand, Chancellor Kent (1 Com. 8) declares that "there is scarcely a decision in the English prize courts at Westminster, on any general question of public right, that has not received the express approbation and sanction of our national courts."

As an instance of undue extension of jurisdiction in the United States, see the Springbok case, elsewhere criticized. *Infra*, § 233.

[2] Field's Code Int. Law, § 898, citing Treaty between France and Peru, March 9, 1861, Art. xxv., 8 De Clercq, 401. It has been ruled that the sentence of a prize court condemning a vessel is not conclusive as to any matter of fact which was the ground of condemnation, unless that matter of fact be clearly and certainly stated in the judgment as a ground of condemnation. Ibid.; Hobbs *v.* Henning, 17 C. B. N. S. 791; 11 Jurist, N. S. 223; Christie *v.* Secretan, 8 T. R. 192; Bolton *v.* Gladstone, 5 East, 155. And such sentence is not evidence of mere inferences of fact that may be drawn from it, when such facts could and should be distinctly stated. Fisher *v.* Ogle, 1 Camp. 418.

That the courts of a neutral nation have no jurisdiction to decide a prize question as between belligerents, see McDonough *v.* Dannery, 3 Dal. 188; Findlay *v.* The William, 1 Pet. Ad. 12; Moxon *v.* The Fanny, 2 Pet. Ad. 309. That the jurisdiction of the capturing power is exclusive, see The Estrella, 4 Wheat. 298; though a neutral power to whose ports a prize is brought may inquire whether its own neutrality has been violated by the captor (The Estrella, 4 Wheat. 298; The Gran Para, 7 Wheat. 471). But prize courts have no jurisdiction of captures on land by land forces (U. S. *v.* Bales of Cotton, 25 Law Rep. 451); nor even when the capture is made by naval officers on shore (Six Hundred and Eighty Pieces of Merchandise, 2 Sprague, 233; Alexander's Cotton, 2 Wall. 404); otherwise, it is said, as to goods taken by officers of a public vessel from a warehouse on the shore of a captured port (103 Casks of Rice, Blatch. P. C. 211); and so of goods thrown overboard by the enemy at sea (The Victory, 2 Sprague, 226).

forcible plunder, by marauders on the high seas, *animo furandi*, and all murders by the same; accessories, as well as principals, being comprehended within the definition.[1] To piracy the doctrine of asportation applies, and if property seized in port be carried away on the high seas, *animo furandi*, this is piracy.[2]—The questions of the right to compel a vessel to hoist her flag, and that of the right of search, are elsewhere distinctively considered.[3] The right of a man-of-war to compel a vessel a ship, over whom any suspicion hangs, to hoist her flag, and, in case of such suspicion continuing and appearing to be well grounded, to search the ship's papers, has been held to be a necessary consequence of the right to seize pirates. But this, as has been seen, is an extra-legal prerogative to be exercised at the risk of the ship making the search.[4]

[1] See more fully, Whart. Crim. Law, 8th ed., §§ 1860 *et seq.*; and as to jurisdiction, Whart. Conf. of L., §§ 815, 842; *infra*, § 350. As to piracy, under the Federal constitution, see *infra*, § 452.

Judge Story, in U. S. *v.* Smith, 5 Wheat. 153, says, "Whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, *amino furandi*, is piracy." But we have to resort to the common law to determine what "robbery" is, and so, in a measure, to determine the meaning of "forcible depredations," which, I suppose, would include partially executed attempts. In the Attorney-General *v.* Kwok-a-Sing, L. R. 5 P. C. 179, the offence was defined as "robbery within the jurisdiction of the admiralty." But Dr. Lushington, in the case of the Magellan Pirates, 1 Spink Ec. & Ad. 81, introduces a new term: "Piratical acts," he tells us, "are robbery and *murder* upon the high seas." Murder, not *animo furandi*, would be piracy by Dr. Lushington, but not by Judge Story. No one of these authorities introduces the qualification of "marauders," which seems necessary to distinguish piracy from revolt.

Sir T. Twiss goes still further: "The maintenance of the peace of the sea is one of the objects of that common law (of nations), and all offences against the peace of the sea are offences against the law of nations, and of which all nations may take cognizance." Twiss, i. § 170. This is quoted without disapproval by Perels, § 12; but it cannot be sustained. If "maintenance of the peace of the sea" is to be interpreted in the same way as we would interpret "maintenance of the peace of the land," this would give to every ship the right to visit and arrest every other ship whose conduct is disorderly, which would be productive of endless conflicts and oppressions.

[2] Magellan Pirates, 1 Spink Ecc. & Ad. 81, cited at large, Phill., op. cit., i. 500.

[3] *Supra*, §§ 194 *et seq.*

[4] *Supra*, § 194; see Perels, § 12; Renault, Revue de Droit Int. xii. 251; Orlotan, ii. 258; Gessner, 12th ed., 303. That probable cause is in such case an excuse for seizure, see The Palmyra, 12 Wheat. 1.

§ 201. A privateer is a vessel armed by private subjects of a belligerent state, sailing under permissive letters from the proper authorities of such state, authorizing it to attack vessels belonging to the other belligerent. Such vessels are not *per se* piratical,[1] "Even if they exceed," says Sir R. Phillimore, "the limits of their commission and commit unwarrantable acts of violence, if no *piratical* intention can be proved against them, they are responsible to and punishable by the state alone from which their commission was issued.[2] It would be difficult," he adds, "to maintain that the character of piracy has been stamped upon such a vessel by the decision of international law."[3] Chancellor Kent speaks emphatically to the same effect, declaring that "the weight of authority undoubtedly is, that non-commissioned officers of a belligerent vessel may at all times capture hostile ships, without being deemed by the law of nations pirates." It is the settled law of the United States, he states, "that all captures made by non-commissioned captors are made for the government."[4] By the principles of international law, the employment by a belligerent of a navy of privateers is as legitimate in marine warfare as is the employment of armed volunteers and partisans in land warfare;[5] and a state when at war has as much a right to commission privateers at sea as it has to commission militia on land.[6] It is true that privateers appropriate their booty to themselves, which is not the case with bodies of volunteers accepted as a part of a military force on land.[7] But on the other hand, those manning ships of war are entitled to a large share of prize money; and privateers may, by their commissions, be placed under the same limitations as ships of war. And in any view, this argument against privateering would be met by putting priva-

Privateers not pirates.

[1] See Mr. W. B. Lawrence's summary in North American Review, July, 1878, p. 21; Whart. Crim. Law, 8th ed., § 1864.

[2] Phill., op. cit., i. 503.

[3] Phill., op. cit., 504; and he cites to this effect, Ortolan, pp. 260–1.

[4] Kent's Com., i. 96; citing The Dos Hermanos, 10 Wheat. 306; The Joseph, 1 Gall. 545. On the other hand, Mr. Field's proposed code, § 741, would prohibit privateering.

[5] See § 221.

[6] See to this effect Ortolan, ii. 58; Perels, § 30.

[7] Bluntschli, Seebeuterecht, 87, 88; Caumont, p. 703; see Bluntschli, Völk. Recht, 3d ed., pref. 46, § 669.

teers on the same footing as to prize money with ships of war. This difficulty being removed, and privateers being subjected to naval control, it is hard to see what greater objections exist to the commissioning of the commanders of privateers than to the issuing of commissions to particular officers to raise troops for local defence. In this way, in fact, as is remarked by Perels, an author of eminence already cited, the necessity of large navies is avoided, as a sovereign with a mercantile marine can readily, by issuing privateering commissions, so harass his enemy's commerce as to equalize the conflict with such enemy though possessing a far superior naval force. The retention of resources which would punish an assailant is one of the best ways of preventing an assault. The United States government having elected, wisely or unwisely, not to maintain a large navy, can only keep its position on the high seas by holding in reserve the right to commission privateers when necessary.[1] But it is the better view that the vessel of a neutral state cannot set up as a protection a commission for a belligerent;[2] and it has been held in this country, that it is a breach of our neutrality system for the subject of a neutral state to contribute to fit out or man a foreign belligerent ship.[3]—At the peace

[1] This is strongly put by Perels.

[2] See Perels, § 34, p. 187; Wheaton, His. 2, 379.

[3] Henfield's Case, Whart. St. Tr. 49; Guinet's Case, ib. 93; Villato's Case, ib. 185; Williams's Case, ib. 652.

In the president's message of December 4, 1854, the position is taken that the right to commission privateers is the only means by which vessels with comparatively small navies can be able to maintain themselves against great maritime powers.

According to Dr. Woolsey (Int. Law, § 121) "a private armed citizen or privateer is a vessel owned and officered by private persons, but acting under a commission from the state usually called letters of marque. It answers to a company on land raised and commanded by private persons, but acting under rules from the supreme authority, rather than to one raised and acting without license, which would resemble a privateer without commission. The commission, on both elements, alone gives a right to the thing captured, and insures good treatment from the enemy." "The right," he adds, "to employ this kind of extraordinary naval force is unquestioned. Nor is it at all against the usage of nations in times past to grant commissions to privateers owned by aliens."

Mr. Jefferson, in a letter dated July 4, 1812, vindicating privateering, says; "Were the spoils less rigidly exacted by a seventy-four-gun ship than by a privateer of four guns; and were not all equally condemned? . . . In

of Paris, on the close of the Crimean war, an agreement was reached by the parties there represented, pronouncing priva-

the United States every possible encouragement should be given to privateering in time of war with a commercial nation. We have tens of thousands of seamen that without it would be destitute of means of support, and useless to their country. Our national ships are too few in number to give employment to a twentieth part of them, or retaliate the acts of the enemy." Coggeshall's American Privateers (N. Y. 1856), in which work is given an interesting exposition of the privateering service of the United States in the war of 1812.

It must be recollected that under the general term "privateers" are enumerated the following:—

(1) Naval officers taking charge of merchant vessels and cruising under the direction of their sovereign in time of war. (2) Officers of merchant vessels, subjects of a belligerent state, cruising under commission from their sovereign in time of war. (3) Volunteer officers of merchant vessels, cruising against the enemy of their sovereign, but without any commission from their sovereign. (4) Subjects of neutral states taking out, for the purpose of preying on the commerce of one belligerent, commissions for this purpose from the other belligerent.

Of these Nos. (1) and (2) do not technically fall under the head of "privateers" according to the position taken by the British government in 1870, as stated in the text. If so, it is hard to see how officers of merchant ships, volunteering as cruisers for their sovereign, can be regarded as pirates by the law of nations. In the final uprising against Napoleon in Germany numberless parties of such volunteers took part; and in our own Revolutionary war, volunteer local troops, in periods of great emergency, frequently took the field, and were recognized as belligerents, though without commission from the sovereign. "Privateers" falling under the head of No. (4), however, must be regarded as mere adventurers in search of plunder, and the recognition of such as belligerents, if not prohibited by the law of nations, is prohibited by the distinctive laws of the United States. This distinction is taken by Mr. Butler-Johnstone in his Handbook of Maritime Rights (London, 1876), 12.

By Swift, a privateer is defined to be an armed vessel, belonging to one or more private individuals, licensed by government to take prizes from an enemy.

In Wilhelm's Military Dictionary, (Phil. 1881), the name "Partisan" is stated to be given to "small corps *detached from the main body of an army, and acting independently against the enemy. In partisan warfare much liberty is allowed to partisans.*" But if so in military, why not in naval warfare? The objection is to the plunder of private property on the high seas, against which the United States have always remonstrated, not to the particular agency employed.

In McCulloch's Commercial Dictionary, London, 1882, privateers are defined to be "ships of war fitted out by private individuals to annoy and plunder the enemy. *But before commencing their operations, it is indispensable that they obtain letters of marque and reprisal from the government whose subjects they are, authorizing them to commit hostilities, and that they conform strictly to the rules laid down for the regulation of their conduct.* All private individuals attack-

teering to be piracy. During the American civil war, when much injury was done to United States shipping by southern privateers, Mr. Seward proposed to accede to the Paris declaration, but this was objected to by England and France, who, by this course, virtually cancelled any pretension on their part to treat privateering as piracy by the law of nations. The United States government subsequently withdrew its offer to accede to the treaty of Paris in this respect, though it took at the same time the position that it would consent to the abolition of privateering if coupled with the recognition of the position that private property of an enemy, not contraband of war, is not open to capture at sea.[1]—But be this as it may, the objections urged to privateering are obviated, as we have seen, by putting privateers under naval control, and placing their rights to prize money under the direction of prize courts. When thus limited, there are many reasons why there should be, at present, no international prohibitions of privateering. It is not desirable that the control of the sea should be secured by sovereigns who adopt the unwise and exhaustive policy of keeping up enormous permanent navies. To such a monopoly there is even a greater objection than there is to giving a particular great corporation (*e. g.*, the East India Company) the monopoly of a particular trade. The monopoly of such a corporation is not necessarily immoral, and has no extraterritorial effects. But the monopoly

ing others at sea, unless empowered by letters of marque, are to be considered pirates."

At the close of the late civil war the United States government declined to prosecute for piracy the officers of Confederate privateers, on the ground that to do so would be to countenance the position that privateering was piracy by the law of nations. See letters of Mr. Bolles, solicitor of the navy, in the Atlantic Monthly for July and August, 1872. These articles are discussed in Sir A. Cockburn's review of the Geneva Arbitration, and in Mr. Bulloch's work on the Secret Service of the Confederate States (New York, 1880), vol. ii. pp. 116 *et seq.*

That the belligerent privateers were not pirates, see argument of Harlan, J., in Ford *v.* Surget, 97 U. S. 619; citing Dole *v.* Ins. Co., 6 Allen, 373; Planter's Bank *v.* Union Bank, 16 Wall. 483; Dole *v.* Ins. Co., 2 Cliff. 394; Fifield *v.* Ins. Co., 47 Penn. St. 166; and other cases. And see Bulloch's Secret Service of the Confederate States in Europe, cited above.

That one nation cannot, without violating the law of nations, send out privateers from neutral ports, see Talbot *v.* Jansen, 3 Dal. 133; Moodie *v.* The Betty, 3 Dal. 288, note.

[1] Spain and Mexico were not parties to the peace of Paris.

of naval power on the seas can only be secured by oppressive and exhaustive taxation, and when it is secured, it dominates the world. Were the claims of the great naval powers to seize private property on the high seas abandoned, this monopoly would be less prejudicial. But, directed as it is to the appropriation of such spoils, it is virtually, if conceded, a monopoly to powers of a particular class, to seize whatever is afloat on the waters which their prize courts may condemn. The suppression of privateering, therefore, is not called for in the interests of peace. Such suppression would only add another stimulus to the increase of naval armaments already bearing so oppressively on the old world; and the effect would be to force on this continent a competition in the ruinous race for naval supremacy in which at present the maritime powers of Europe are engaged. And it should also be observed that a privateer navy is the militia of the seas, consistent as is the militia of the land with industrial pursuits, adding to the wealth and comfort of the community when war does not exist. When the calamity of war does come, then there will be enough shipping and sailors disengaged from their prior employments to man such militia fleets. It is no doubt a choice of evils. But as long as the seizure of belligerent private property on the high seas is countenanced by the European marine powers, so long it is better for the United States to hold the right to turn their merchant service into naval service in case of war, than for them to overburden the country by an enormous navy in times of peace. It is also to be observed that if the restrictions above proposed be adopted, it is hard to see in what respect privateering would differ from the system of volunteer naval war adopted by Prussia in the Franco-German war of 1870. "She invited ship-owners to lend their ships for the war for a remuneration. The crews were to be hired by the owners, but were 'to enter the Federal navy for the continuance of the war, wear its uniform, acknowledge its competency, and take oath to the articles of war.' In case these ships destroyed or captured ships of the enemy, certain premiums were to be paid to the owners for distribution among the crews. The French government complained to Lord Granville about this decree, saying that it was under a disguised form the re-establi[illegible]

of privateering; but Lord Granville, after consulting the then law officers, Sir Travers Twiss, Sir R. Collier, and Sir John Coleridge, replied: 'They advise me that there are, in their opinion, substantial differences between the proposed naval volunteer force sanctioned by the Prussian government, and the system of privateering which, under the designation of "la course," the declaration of Paris was intended to suppress, and that her majesty's government cannot object to the decree of the Prussian government as infringing the declaration of Paris."[1] To the same effect is the opinion of Bluntschli. "Nothing," declares that eminent publicist, "prevents a state from forming a body of volunteers to be employed as a part of the auxiliary force of its army; so a maritime nation may, with entire propriety, reinforce its fleet by adding vessels previously employed in commerce. An appeal may even be made to all the forces of the nation—to a sort of naval Landsturm—to combat the enemy."[2]

[1] Mr. Lawrence in North Amer. Rev. for July, 1878, p. 32; citing Solicitors' Journal, vol. xxii. p. 523. See, also, Twiss, Duties in Time of War, p. 423.

[2] Revue de Droit Int., vol. ix. p. 552. It is stated that the late "Confederate government," owing "to the disabilities to which their privateers were exposed in foreign ports," discontinued privateering, and its cruisers "claimed the right of public ships-of-war, and were commanded by officers commissioned by the Confederate state." North Amer. Rev., *ut supra*, p. 31.

Mr. Seward's circular of April 24, 1861, proposing to abolish privateering, shows on its face that the proposition was a mere temporary expedient induced by the exigencies of the civil war. He recites the propositions of the Paris congress, (1) that privateering be abolished; (2) that neutral flags should cover enemy's goods; (3) that neutral goods should not be liable to capture under enemy's flag; and (4) that blockades must be effective. He then calls attention to the fact that when the president (Mr. Pierce), on July 14, 1856, declined to accede to these propositions, Mr. Marcy, then secretary of state, said that the United States were willing to accept the abolition of privateering "with an amendment which should exempt the private property of individuals, though belonging to belligerent states, from seizure, or confiscation by national vessels in maritime war." This, however, was not acceded to by England, and the proposition, in Mr. Buchanan's administration, was withdrawn. Since then, however, things have changed. "Europe seems once more on the verge of quite general wars. On the other hand, a portion of the American people have raised the standard of insurrection, and proclaimed a provisional government, and, through their organs, have taken the bad resolution to invite privateers to prey upon the peaceful commerce of the United States. *Prudence and humanity combine in persuading the president, under the circumstances, that it is wise to secure the lesser good*

XII. Pacific Remedies for Wrongs.

§ 203. Not every international quarrel is ground for a formal application for redress. One sovereign, for instance, may treat another with supercilious contempt; but if so, unless there is something to sustain a demand for an apology, the only remedy is suspension of intercourse. Nor can one nation complain internationally because it is distanced in the race for international eminence by another; nor because its products have lost a market by the legislation of such other nation. The wrongs for which international redress can be had must be intentionally committed or attempted by force against the dignity of the offended state, or against the property or persons of its subjects. They must be delicts by the law of nations.

International wrongs must be delicts by the law of nations.

§ 204. If the question is dependent on a treaty, it is easily settled. Where a treaty says that neither party shall permit the coaling of steamers of a power at war with the other party, then such coaling at the ports of the neutral, if negligent or malicious,

Extent of such delicts still undetermined.

offered by the Paris congress, without waiting indefinitely in hope to obtain the greater one offered to the maritime nations by the President of the United States." This proposition was not entertained by England and France, and that it was a mere transient impulse of Mr. Seward, and was speedily withdrawn, if not forgotten, is illustrated by his letter of July 12, 1862, to Mr. Adams, in which he says, "This transaction will furnish you a suitable occasion for informing Earl Russel that since the Oreto and other gun-boats are being received by the insurgents from Europe to renew demonstrations on national commerce, congress is about to authorize the issue of letters of marque and reprisal, and that if we find it necessary to suppress that piracy, we shall bring privateers into service for that purpose, and of course, for that purpose only." Congress did not authorize the issuing of letters of marque and reprisal, it not being "necessary;" but that such a step should be held by Mr. Seward to be the duty and right of the government shows that his circular of April 24, 1861, must have been regarded by him, if regarded at all, as recalled. It certainly was never acted on by any European power.

Citizens of the United States are forbidden by statute to take part in the equipment or manning of privateers to act against nations at peace with the United States. Act of June 14, 1797, and April 24, 1816. Treaties making privateering under such circumstances piracy have been negotiated with England, France, Prussia, Holland, Spain, and Sweden. See letter of Mr. Marcy, of April 28, 1854, and president's declaration of neutrality, of April 20, 1818.

may be a delict. But when there is no treaty limitation, then the questions arising under this head may be beset with much difficulty. Four rules, however, may be regarded as settled: (1) The fact that a state imposes on its subjects severer restrictions as to neutrality than are imposed by the law of nations does not make such self-imposed restrictions the standard between itself and belligerents, it being bound to belligerents, not (if there be no treaty) by its municipal law, but by the law of nations.[1] (2) A state, by taking a lax view, in its domestic legislation, of the duties of neutrals, does not incorporate such rules into the law of nations; and yet it may expose itself, if it complains of other nations taking equally lax views, to the retort that the act complained of is one which its own legislation sanctions. (3) Incapacity on the part of the state by whose subjects the injury was inflicted to prevent the injury is no defence. A state is bound to suffer the consequence if it permits its subjects to invade the rights of another state. (4) A state, which, by its own negligence, exposes itself to the fillibustering attacks of the subjects of another state, may lose the right to recover.[2]

Restitution or indemnity.

§ 205. Restitution or indemnity may be voluntarily made by one state to another in case of admitted injuries, as in the case of the payment by Great Britain to the United States of losses incurred by the depredations of the Alabama; and of the restoring by the United States to Great Britain of Messrs. Mason and Slidell, taken by Admiral Wilkes from the Trent.[3] To restitution and indemnity apology is added when properly due.[4]

[1] *Infra*, § 241; see Whart. Crim. Law, 8th ed., § 1901.

[2] See *infra*, §§ 240 *et seq.*

[3] See, for other illustrations, Hartmann, § 90; Phillimore, ii. 46.

[4] As illustrations of restitution, in cases of invasions of neutral rights, may be mentioned the following: In 1863, the Chesapeake, a passenger boat running between New York and Portland, was seized and diverted to their use by a party of Confederates, who had entered the vessel on various pretences in New York. The vessel was pursued by a United States cruiser, and seized, with those on board her, in British waters. The vessel and the men were surrendered by the United States government to the British authorities, with an apology for the invasion of territory.—In 1864 the Confederate steamer Florida was seized by a United States cruiser in the harbor of Bahia, belonging to Brazil. Repa-

§ 206. Retorsion and reprisal bear about the same relation to arbitration and war, as the personally abating a nuisance does to a suit for its removal. States as well as individuals have a right to protect themselves when injustice is done them by removing the cause of offence; and that in disputes between nations this right is more largely extended than in disputes between individuals, is to be explained by the fact that in disputes between nations there are not the modes of redress by litigation which exist in suits between individuals.—"Retorsion" and "reprisal" are often used convertibly; though the difference is that "retorsion" is retaliation in kind, while "reprisal" is seizing or arresting the goods or trade of subjects of such state as set-off for the injuries received. Under this head fall embargoes, and what are called pacific blockades (blocus pacifique), by the former of which trade is forbidden with the offending state; by the latter of which a port belonging to the offending state is closed to foreign trade. These acts approach in character to war, to which they generally lead; yet technically they are not war, and there are cases where the remedy has been applied without war resulting.[1]

Retorsion and reprisal

ration was demanded; and, though the Florida could not be restored, having foundered, her crew was given up to Brazil, and an apology tendered. See Dana's Wheaton, notes 207 and 209; Hall's Int. Law, 544.

On the topic in the text may be consulted Le Droit de la Guerre, par Ernest Nys, Brussels, 1882, pp. 27 *et seq.*, in which mediation is historically examined.

[1] Holtzendorff, *ut supra*, 1238, citing Sanford's Law of Special Reprisals, 1858; Wurm's Selbsthülfe der Staaten in Friedenzeiten. Perels (§ 30) cites as an illustration of reprisal, the action of the British government in 1861, in seizing, as an indemnity for the pillage of a stranded British ship, several Brazilian merchant ships.

The evils attending reprisals are well exhibited in Nys's Le Droit de la Guerre, Brussels, 1882, pp. 40 *et seq.*

Wheaton, after noticing embargoes and sequestrations, to be hereafter considered, specifies the following modes of reprisal:—

1. Taking forcible possession of the thing in controversy, by securing to one's self by force, and refusing to the other nation, the enjoyment of the right drawn in question.

2. Exercising the right of vindictive retaliation (*retorsio facti*), or of amicable retaliation (*rétorsion de droit*); by which last the one nation applies, in its transactions with the other, the rule of conduct by which that other is governed under similar circumstances. Lawrence's Wheaton, Elements of Intern. Law, pt. IV., ch. i. § 1; Dana's Wheaton, § 290: citing Vattel, liv. II. ch. xviii.; Klüber, Droit des Gens Modernes de l'Europe, § 234; see, also, Wildman's International Law, i. 187; Halleck's Intern. Law, 297.

§ 207. Hence it is in the power of a state to shut its ports to the shipping of another state with whom it has a supposed cause of offence; and this is regarded as an international right. This course was taken by Mr. Jefferson's administration towards England; and the right was conceded by both England and France. A belligerent, also, may lay an absolute general embargo on its own ports as against vessels of all nationalities. But neutral vessels entering such a port in defiance of such an embargo are not open to confiscation in the same way as is a vessel running a blockade. Repulsion, not confiscation, is the remedy.[1]

Embargo.

§ 208. The practice is now prevalent, in cases of a controversy between nations which does not from the nature of things necessarily involve war, to ask an independent nation to act as arbitrator; and in some instances the offer of arbitration is made by a state friendly to both of the litigants. Arbitration was declared by the peace of Paris, in 1856, to be the proper course in all cases of international disputes; though the principal parties to that peace were afterwards very far from following the rule they themselves laid down. But arbitrations, especially in cases of disputed boundary, are often efficacious, and each year adds to the confidence felt in them as an honorable and effective mode of doing justice and of avoiding war. Of arbitration, it is only necessary here to say that it is governed by the terms of the treaty prescribing it, and when these terms are not precise, by the usages adopted in international law, and when these fail, by common law rules in respect to arbitrations of private litigations.[2]

Mediation now usually attempted to avert war. Arbitration

XIII. War and its Incidents.

§ 209. War is the final and often the essential appeal for the redress of national wrongs. A weak state may appear to court ruin by declaring war against a powerful aggressor; yet submission may be less destructive

War the final appeal.

[1] Perels, § 52.

[2] As to the Geneva arbitration, see *infra*, §§ 244 *et seq.* As to the fishery award of 1878, see article by Senator Edmunds, in North Am. Rev., Jan. 1879, p. 1, in which the question whether arbitrators are to be unanimous is discussed.

than war, and there are few instances in modern history in which the heroic resistance of a weak state to the aggressions of an invader has not gradually obtained for it effective allies. It must, also, be recollected that a state is not subject to punishment as such. It may be insulted and assailed; its ports may be seized, its cities burned, and heavy contributions may be levied on it; but tried, convicted, and executed as a criminal it cannot be.[1]

§ 210. It must be remembered that only states can be parties to a war. A band of marauders, which, without incorporation into the army of a specific sovereign, undertakes to perform acts of war, subjects its members to indictment for murder or robbery, as the case may be. Whether, however, when an insurrection exists, the insurgents are to be treated as belligerents, is a difficult question, dependent upon the extent to which the organization of the insurgents has acquired local authority and permanence. That a foreign government should recognize insurgents as belligerents is not a matter which the government revolted from can treat as a cause of war.[2] But however this may be, all the subjects of a sovereign are ordinarily parties to a war he declares. "When the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other."[3]

Only states can be parties to war; but involves all subjects.

§ 211. Unless a declaration of war is made as soon as war is determined on and overt acts of war are begun, not only might a party springing an attack have an unfair advantage, but neutrals might be greatly injured. It is part of the law of nations, therefore, that a declaration of war should precede an attack;

Declaration of war should be formally made.

[1] Phill. Int. Law, 3d ed., i. 5. As to "coercion of a state" see *infra*, § 378.

[2] See this question discussed, *supra*, §§ 140 *et seq.*

[3] Kent's Com., 156. *Infra*, § 214.

That the Confederate states in the late civil war were belligerents, see *supra*, § 141; *infra*, § 217.

It has been held by the supreme court of the United States that military action, even by an insurgent soldier, does not render him liable in a civil court when the insurgent government is recognized as belligerent. Ford *v.* Surget, 97 U. S. 594; see Whart. Crim. Law, 8th ed., §§ 94, 283, 310; and see *supra*, §§ 144, 178, *infra*, § 221, for other authorities.

but this rule is by no means generally followed,[1] nor is there any fixed prior notice required. In recent times, the fact that one nation intends war against another is known from the nature of the preparations, as soon as these preparations take specific shape; and the formal declaration is not issued until its contents are generally understood. A declaration of war, also, may be implied: as where an act of hostilities takes place which can be explained on no other hypothesis. A declaration of war, also, may be conditional, that is to say, war is declared unless a certain condition, called an *ultimatum*, is performed on the other side. In cases of civil war, also, when the party in power has not as yet acknowledged the insurgents as belligerents, it cannot be expected that a declaration should be formally made by the party in power.[2] Nor is this necessary under the constitution of the United States.[3]

Provisional governments may be established.

§ 212. An invading army is authorized, according to international law, to appoint officials for the purpose of determining matters relative to the occupation. This does not vacate the authority of the local courts as existing at the time of the invasion. It simply establishes by their side a tribunal which in all matters relative to the occupation is supreme so long as the occupation is in force. The occupying authorities, however, have internationally no right to call upon the subjects of the occupied territory for military service, or for a betrayal of political secrets, though requisitions may be imposed, and a strict submission to military police exacted.[4]

[1] That declarations of war are fallen into disuse, and that wars in modern times usually begin by a surprise attack, see article in London Spectator of December 8, 1883, p. 1573.

[2] Prize Case, 2 Black, 635.

"Where the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest as a war."—Field's International Code, § 709.

[3] *Infra*, § 454.

[4] As to military provisional governments during the late American civil war, see Milligan *ex parte*, 4 Wal. 2; Ford *v.* Surget, 97 U. S. 594. In Texas *v.* White, 7 Wall. 700, such governments were sustained.

As to such governments generally, see Leitensdorfer *v.* Webb, 20 Howard, 176; Cross *v.* Harrison, 16 How. 164.

§ 213. Deceit, so it is held, when exercised by military officers for the purpose of misleading an enemy, is not inconsistent with the law of nations. The concoction of false news and of despatches containing traps, and the use of spies, have been resorted to by the most meritorious of generals. Great material destruction of an enemy's property is permitted, also, when the object is to impair his belligerent capacity, and it has been considered allowable to burn towns and devastate a country when necessary to drive an enemy from the field, and to flood the land, when by this way the enemy would lose his supplies. The same remarks may be made as to the destruction of railroads and telegraph lines by which the enemy obtains supplies and information. But the destruction ought not to exceed what is necessary under the peculiar circumstances of the case. A destruction of a line of road may be justifiable, but not the deliberate destruction of depot buildings which could not be used for military purposes. There is also a general acquiescence in the neutralization of hospitals and ambulances.[1] The general sense, also, of civilized nations forbids the wanton destruction of public buildings, of objects of art, and of great international enterprises, such as submarine telegraphs and tunnels, or canals between distinct states. The only feasible limitation as to the use of arms is that proposed by the Petersburg convention of Nov. 29, 1868, condemning the use of explosive hand firearms. The Russian government, however, failed in its effort at the Brussels conference of 1874 to obtain action of other European governments on this topic.[2] The test with regard to warlike agencies is *detriment*. Whatever would cripple an antagonist in his warlike movements is allowed. But the crippling must be direct, not indirect. Soldiers acting as such may be slain

Deceit allowed; and so of great material destruction.

That provisional courts may be established by an invader, see U. S. *v.* Reiter, 4 Am. Law Reg. 534.

[1] Bluntschli, 3d ed., § 586.

[2] See Holtzendorff, *ut supra*, 1242; Las leyes de la guerra, etc., 1857; Montague Bernard, Laws of War, 1856; Lieber's Codification, 1860; Bluntschli in Holtzendorff's Jahrbuch, 1871, p. 270; Morin, Les lois relatives à la guerre, vol. ii., 1872.

in open field, but this must be in avowed warfare, all private killing, and of all private persons not enrolled in an army being murder. Nor is it allowable to burn private property, unless it directly contributes to the support of the enemy's army. In case of excesses of this kind being committed on one side, the right of reprisal belongs to the other.[1]

[1] As an illustration of the amelioration wrought in the last few years may be mentioned the contrast between the Franco-German war of 1870, in which pillage and maltreatment of prisoners were scrupulously avoided, with the Peninsular war of 1812–3. In a letter from Captain Bowles, of the Guards (a relative of Lord Malmesbury, and in constant intercourse with Wellington), to Lord Fitzharris, April 7, 1812 (Malmesbury Correspondence, i. 264), we have the following statement in respect to the capture of Badajoz: "Lord Wellington was extremely anxious that as *few prisoners* [italics as in text] should be made as possible, but our men could by no means be induced to do anything but *plunder* the instant the affair was decided." After the fall of St. Sebastian, Capt. Bowles (Sept. 30, 1812) writes (ib. 383): "After gaining possession of the town, and driving the garrison into the castle, the usual horrors commenced, and every species of enormity was committed, and Ciudad Rodrigo and Badajoz were imitated and surpassed, and *Herod completely out Heroded.*" Yet St. Sebastian was a Spanish town; the French were in the citadel; and with the Spaniards the English were supposed to be in alliance. The conduct of the English was not probably in any respect more atrocious than the French in these frightful campaigns. It is to prevent such atrocities that the recent conventions between belligerents have been framed. As another instance of the improvement in this respect, may be noticed the contrast between the conduct of the German army in the capture of Paris, in 1871, and that of the British army in the capture of Washington in 1814. By the Germans, notwithstanding the fact that they were fired on from private houses, the public buildings of Paris were scrupulously preserved; by the British, the capitol and the president's dwelling-house at Washington were destroyed, though the place was only taken on a sudden raid, and the invaders were compelled immediately to retreat, and though there was no pretence that there had been any invasion of the laws of war by the inhabitants of the captured city. It may be said that the burning of a portion of the city of Columbia by Sherman's army, during the late civil war in this country was a similar atrocity. But the answer is (1) that a careful perusal of the evidence on both sides will lead to the conclusion that the fire was started by stragglers not under the military control of either army; (2) the burning of the city was not only expressly prohibited by General Sherman but expressly disavowed; whereas the burning of Washington was expressly ordered by the British commander and expressly avowed. That this difference is a difference not of nationality but of era, is shown by the humanity and forbearance which marked the progress of British arms in Egypt in 1882. That such acts of devastation are not only useless but

§ 214. It has been already stated that when war exists between two sovereigns, all the subjects of one are at war with all the subjects of the other.[1] Nor is this war limited to matters military. There cannot be war in battle with peace at commerce. It has therefore been held that business contracts between the subjects of one belligerent state with the subjects of another are void, as tending at least to swell the resources of one or the other of the belligerents; and in such case it makes no difference when such contracts were made, and where they are to be performed.[2] It has been argued, however, that this rule does not apply to a case which does not involve the transfer of property or credit from one belligerent to another.[3] And it certainly does not apply to ransom bills necessitated by war, and not instruments of ordinary commerce.[4] A contract made before the war, however, is only suspended during the war, and revives when peace is announced.[5] License from the home

Commerce between belligerents prohibited.

detrimental to the goverment directing them, is shown by the fact that the wanton destruction of the public buildings at Washington in 1814 almost extinguished the party which had previously urged the concessions to England on which a pacification could be based.

As to action of the International Military Commission, at St. Petersburg, agreeing to prohibit the use in time of war of all explosive projectiles weighing less than four hundred grammes, see Army and Navy Journal, New York, November 28, 1868.

To use poison in war is an offence by international law. Fiore, ii. 279; Field, Code, etc., § 754. Bluntschli, § 560, takes strong ground against explosive musket balls and chain-shot.

[1] *Supra*, § 210.

[2] Abdy's Kent, 294; Wheat. Int. Law, 356; Anthan *v.* Fisher, 2 Dougl. 649; Scholefield *v.* Eichelberger, 7 Pet. 586; Phillips *v.* Hatch, 1 Dillon, 571; Crawford *v.* The William Penn, 3 Wash. C. C. 484; U. S. *v.* Grossmeyer, 9 Wall. 72; Stevenson *v.* Payne, 109 Mass. 378; Hyatt *v.* James, 2 Bush, 463; Noblom *v.* Milborne, 21 La. An. 641; Rice *v.* Shook, 27 Ark. 137.

That domicil and not prior nationality determines whether a person is in this sense an enemy, see Bell *v.* Reid, 1 Maule & S. 726.

[3] Kershaw *v.* Kelsey, 100 Mass. 561.

[4] 1 Kent, 68.

[5] McConnell *v.* Hector, 3 Bos. & Pul. 113; O'Mealy *v.* Witson, 1 Camp. 482; Stiles *v.* Easley, 51 Ill. 275; Seymour *v.* Bailey, 66 Ill. 288.

Under this rule the British admiralty has gone so far as to vacate a contract for the sending of supplies to a British colony temporarily in the enemy's hands. Bella Guidita, 1 C. Rob. 307. Trade conducted through the medium of ships of truce, or "cartel ships," as they are called, is strictly prohibited. The Carolina, 6 C. Rob. 336; see Whart. on Cont., §§ 473 *et seq.*

Nor can there be any business inter-

government will validate business intercourse with an enemy,[1] but sailing by a neutral vessel under an enemy's license has been held ground for forfeiture by the other belligerent.[2] A license, however, to be valid must come either directly or indirectly from the supreme authority,[3] and must not have been obtained by misrepresentations.[4] Whether a subject of a state can be separated from the state so far as to enable him to be regarded as concerned in a war only when contributing to it, or whether every subject, active or passive, is to be regarded as an enemy of that state's enemy, is a question much discussed. The great weight of authority goes to the latter view, which is concurred in by Martens, Kent, Wheaton, Woolsey, Lawrence, Phillimore, Twiss, Halleck, and Hall. That a subject of a state only participates in its wars when aiding them is maintained by Bluntschli and Fioré, but this view has no support in England and the United States.[5]

course between the districts actually occupied by opposing belligerent armies after notice of occupation, whether such business is forbidden by proclamation or not, unless such business be authorized by agreement of the belligerent nations, or by the military authority having command of the frontier. Field's Code Int. Law, § 921; citing Bluntschli, Droit Int. Codifié, § 674; Lieber's Instructions, ¶ 86; Hennen *v.* Gilman, 20 La. An. 241; Graham *v.* Merrill, 5 Coldwell (Tenn.), 622; Bank of Tennessee *v.* Woodson, 5 id. 176.

That a declaration of hostilities involves an interdiction of all commercial intercourse with the enemy, on the part of the subjects of the belligerent nation, without express license, see Lawrence's Wheaton, Elem. of Int. Law, pp. 544, 551, § 13; Dana's Wheaton, §§ 309, 315; Barrick *v.* Buber, 2 C. B. N. S. 563; Esposito *v.* Bowden, 7 E. & B. 769; Phillips *v.* Hatch, 1 Dillon, 571; cited Field, *ut supra*.

According to Heffter (§§ 122, 123), a declaration of war does not of itself prohibit commercial intercourse, but such intercourse may go on, unless specially prohibited, and as far as not so prohibited; which seems to be an opinion rather than a statement of law; for precedent and practice, and the opinions of jurists are the other way. Dana's Wheaton, note 158, p. 400.

That the rule in the text applies to civil war, see Semmes *v.* Ins. Co., 36 Conn. 543; 13 Wall. 158; Whart. on Cont., § 474.

[1] Woods *v.* Wilder, 43 N. Y. 164.

[2] The Alliance, Blatchford Prize Ca. 262; The Alexander, 8 Cranch, 169; The Caledonian, 4 Wheat. 100.

[3] Halleck, Int. Law, 675–690; Manning, Law of Nations, § 123: Wildman, Int. Law, ii. 245–266; 1 Kent's Commentaries, 163; 1 Duer on Insurance, 594–619; Hautefeuille, tom. i. p. 19; Woolsey's Int. Law, § 147; Phillimore's Int. Law, iii. 249, 613; cited in Field's Code of Int. Law, § 921.

[4] Dana's Wheaton, note 198, p. 504.

[5] See Hall. Int. Law, 58.

§ 215. It was at one time held that the body of a soldier on the battlefield could be rifled of whatever valuables were on it, and that it was within the range of power of a commander, upon taking a fortified place by assault, to give it up for a limited time to plunder. These views now no longer obtain. Whosoever despoils a corpse of personal property (not arms) is indictable for larceny; and the soldier who seizes by force valuables from inhabitants of a belligerent territory is indictable for robbery. And the right to expose a captured city to storm is no longer recognized in international law.[1]

Booty not permitted.

§ 216. It is within the power of an invading army to seize upon and appropriate all money or provisions held by the enemy for public purposes. As to private property, important distinctions are to be taken. Provisions necessary for the support of the invading army may be seized, upon the price fixed officially for such provisions being offered or promised; and the prevalent opinion is that in cases of necessity provisions may be seized without payment of price or promise to pay. When subjects of one belligerent are at the time of breaking out of the war residing in the dominions of the other belligerent, they are not, in ordinary practice, molested. In the Franco-German war of 1870 all Germans were at the outset ordered out of Paris. This is undoubtedly within the power of a belligerent. But no such measures should be taken except when required by public safety; and in any view, the property of such persons, unless personally taking the part of the state of their residence, should not be disturbed. And it has been held by the supreme court of the United States, that upon the breaking out of a war the United States government is not entitled to seize and confiscate goods found in its territory belonging to the enemy, unless authorized by congress, and in subordination to the limits congress imposes.[2]

Public but not private property can be seized.

[1] But see Cote *v.* U. S., 3 N. & H. 64. 5 Blatch. 231. It has been held that the act of congress declaring war against Great Britain did not work such con-

[2] *Infra*, § 455; Brown *v.* U. S., 8 Cranch, 110; U. S. *v.* Shares of Stock,

§ 217. Whatever we may say on this point, the right to capture and confiscate private property of insurgents is gene-

fiscation. The Juniata, Newberry, 352. In Brown *v.* U. S., *ut. sup.*, the right to confiscate debts was asserted; and Ware *v.* Hylton, 3 Dal. 199, was relied on as authority. But the better view is that the property of the inhabitants of an invaded country should not be taken by an invading army without remuneration. (U. S. *v.* Stevenson, 3 Benedict, 119; Bluntschli, § 657.) In the United States Articles of War, of 1863, § 2, art. 37, it is said: "The United States acknowledge and protect, in hostile countries occupied by them, religion and morality, strictly private property, the persons of the inhabitants, especially those of women, and the sacredness of the domestic relations. Offences to the contrary shall be rigorously punished." To the effect that private property cannot be seized by an invading army, unless contraband, see Kent's Com., i. 93 *et seq.*; U. S. *v.* Homeyer, 2 Bond, 217; Transactions of the National Association for the Promotion of Social Science, 1860, pp. 163, 279; id., 1861, pp. 126, 748, 794; id., 1862, pp. 89, 896, 899; id., 1863, pp. 851, 878, 884; id., 1864, pp. 596, 656; id., 1868, pp. 167-187; Hautefeuille, Droits et Devoirs, i. 340-44; Martens, Essai sur les Armateurs, s. 45; and other authorities given in Field, *ut sup.* Heffter (Völkerrecht, s. 130, 132, 139, 140, 175, 192) holds that war gives only actual possession, but not the legal property in such captures.

Dr. Woolsey (Int. Law, § 118, *note*), after noticing Hamilton's argument against confiscation (Hamilton's Works, vol. vii., 19th Letter of "Camillus"), adds, speaking of the confiscation of the private property of the subject of an enemy, "The foreigner brought his property here, it can at once be said, knowing the risk he might run in the event of a war. Why should he not incur the risk? He should incur it, say the older practice and the older authorities. He should not, says the modern practice, although international law in its rigor involves him in it. He should not, according to the true principle of justice, because his relation to the state at war is not the same with the relation of his sovereign or government; because, in short, he is not in the full sense an enemy." To this it may be added that when a foreigner invests property in a country with the permission of its government, there is an implied understanding that his title thereto will be respected unless divested by his personal act.

As sustaining the right of seizure of private property in an enemy's country, see The Venus, 8 Cranch, 253; The Ann Green, 1 Gall. 274; The Lilla, 2 Sprague, 177; The Friendschaft, 3 Wheat. 15; 4 Wheat. 105. That this does not impress with belligerency a neutral on motion to leave *bona fide* belligerent territory, see The Venus, *ut supra;* The St. Lawrence, 1 Gall. 467. That neutrals and citizens are to be allowed a reasonable time, after breaking out of war, to withdraw from a belligerent country, see The Sarah Starr, Blatch. Pr. Ca. 650; The General Pinckney, ibid. 668.

In Mitchell *v.* Harmony (13 Howard, 115) it was held that private property could only be taken by a military commander in cases of necessity, for public use, to prevent it being used as contraband of war or falling into the enemy's hands. This, in the late civil war, was held to be the case with cotton,

rally claimed, and the exercise of this power by congress is, as we will see, permitted, under certain limitations, by the constitution of the United States.[1] But such seizure, unless of contraband of war, cannot be at the discretion of a commanding officer. It must be in accordance with a law of confiscation to be adopted by congress.[2]

Distinction in this respect as to insurgents.

§ 218. On the question of how far goods at sea are liable to seizure by a belligerent, we have the following theories:—

Conflict of opinion as to whether sailing under an enemy's flag exposes neutral goods to seizure.

(1) Neutral flags do not protect goods belonging to belligerents; but belligerent flags do not necessarily impart their character to the goods on board the ship. This is the English view as acted on during the Napoleonic wars, and the effect was to expose all neutral ships to the inspection of English cruisers.

(2) As a matter of reprisal, the French government took the position that, if either the vessel or the cargo belonged to a belligerent, this would sustain a capture by the other belligerent.

(3) It is maintained by recent high German, Italian, and American authorities, that the flag imparts its character to

which, as one of the chief military supports of the Confederacy, was regarded as contraband. Alexander's Cotton, 2 Wall. 404. In this case, Chief Justice Chase, giving the opinion, declared that the right of capture "may now be regarded as substantially restricted to 'special cases' (citing Chancellor Kent) 'dictated by the necessary operation of war;' and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of gain.'" In U. S. *v.* Klein, 13 Wall. 128, he says: "No titles were divested in the insurgent states, unless in pursuance of a judgment rendered after due legal proceedings. The government recognized, to the fullest extent, the humane maxims of the modern law of nations, which exempt property of non-combatant enemies from capture or booty of war." To same effect see Lamar *v.* Browne, 92 U. S. 194.

"In respect to real property the acquisition by the conqueror is not fully consummated until confirmed by a treaty of peace, or by the entire submission of or destruction of the state to which it belonged." Clifford, J., U. S. *v.* Huckabee, 16 Wall. 434.

[1] *Infra*, §§ 467, 471.

[2] That the Confederate forces in the late civil war were regarded as both belligerents and insurgents, see *infra*, § 455.

the cargo: "free ships, free cargo; belligerent ships, belligerent cargo."

(4) The rule proposed by the Paris conference of 1856 went still further, providing that free ships make free goods, with the exception of contraband of war; but that the fact that a flag is belligerent does not expose to capture the cargo it covers. "Neutral ships protect the goods of belligerents; neutral goods cannot be seized on board belligerent ships."[1]

The English practice is to hold that goods laden before the war, are exempt from seizure.[2]

In France the claim to seize goods of a belligerent on neutral ships was for a long time contested, though it was accepted during the Crimean war;[3] while it has been on several occasions approved by our Federal courts.[4] It has been also held that an insurance made on goods thus exposed to capture is void.[5] But it is hard to defend these rulings on principle. The capture of ships belonging to an enemy may be regarded in the same light as the occupation of territory belonging to an enemy; a ship being part of the territory of the state to which she belongs.[6] But the better opinion, as we have seen, is that an invading army occupying a territory belonging to an enemy has no right to seize and confiscate goods, if not contraband of war, belonging even to the subjects of such enemy. On the same reasoning, a belligerent cruiser, in capturing an enemy's ship, has no right to seize and confiscate goods on such vessel even belonging to a subject of such enemy. And if the claim to seize such goods is too generally acquiesced in to be disputed, it ought not to be extended so as to comprehend the seizure of enemy's goods on neutral ships, or of neutral goods on enemy's ships.[7] To

[1] Holtzendorff, *ut supra*, 1253, citing Vedari, Del rispetto della proprieta privata, etc., 1867; Bluntschli, Beuterecht, 1878; Perels, § 35; Yeaman, Observations on International Prize Law, 1867.

[2] The Vrow Elizabeth, 5 C. Rob. 10. For order of council justifying such seizure, see 1 Spinks, Ec. & Ad. App. p. ix.

[3] Lawrence's Wheat., note 228.

[4] The Julia, 8 Cranch, 181; The Nereide, 9 Cranch, 388; The Ariadne, 2 Wheat. 143; The Caledonia, 4 Wheat. 100.

[5] Ogden *v.* Barber, 18 Johns. 87; Craig *v.* Ins. Co., 1 Peters, C. C. 416.

[6] *Supra*, § 188; *infra*, § 308; Whart. Conf. of Laws, 2d ed., § 356.

[7] See *supra*, §§ 191, 194 *et seq.*

:he rule the scope assigned to it by English courts is to roperty on the seas, in time of war, under the control of ɔlligerent having the greatest naval force.[1]

the Nereide (9 Cranch, 388), ɔreme Court of the United States e position that an enemy's goods could be seized wherever they und, but that a neutral's goods not be seized though sailing ɑn enemy's flag. It was admit- the court that this rule had ɑuch contested, and had been d by various treaties and con- ɑs; but it was then said that, onceding that free ships made ɔds, this did not imply the con- hat enemy's ships should make s goods. But the United States ment, in its diplomatic corre- nce, has vigorously maintained le that a neutral flag protects 's goods, not contraband of war; ɔ far as The Nereide conflicts ɑis view, it must be regarded as ɔd by the more recent decision, :eferred to, that a ship is part territory of the state to which ongs. *Supra*, § 188.

particular point ruled in The e is that neutral property laden ɑgly on board a belligerent does not lose its neutrality hough the cruiser forcibly re- :apture, if the neutral owner of ɔds did not aid in the resistance. posite view of this point was in The Fanny, 1 Dods. 443. In ɔreide, it was held by the major- the judges that the right of ls to carry on their trade in an 's ships is not affected by the ɑat the latter ships are armed. ereide, 9 Cranch, 441. (Story, ɜ.)

ɑustaining the ruling in The e, see 2 Kent's Com. 125; an by Mr. Pomeroy in North Am. Rev. Ap., 1872; Wheaton, Dana's notes, 158, 171. Mr. Jefferson (letter to Genet, July 24, 1793) and Messrs. Pinckney, Marshall, and Gerry, when addressing the French government, argued that France could not, in accordance with her own antecedents, dispute the rule as against England. See Lawrence's Wheat., note 192; Dip. Corr. U. S., 1861, pp. 143, 251; Field's Int. Code, § 246.

In Mr. Seward's letter to Lord Lyons, of December 20, 1861, he states: "It had been settled by correspondence that the United States and Great Britain mutually recognized as applicable to this local strife (the civil war) those two articles of the declaration made by the congress of Paris of 1856, namely, that the neutral or friendly flag should cover enemy's goods not contraband of war, and that neutral goods not contraband of war are not liable to capture under an enemy's flag."

Mr. Fish, in 1870, when secretary of state, expressed to Baron Gerolt, the Prussian minister, the hope that "the government and people of the United States would soon be gratified by seeing the principle" of the immunity of private property at sea, "universally recognized as another restraining and harmonizing influence imposed by modern civilization on the art of war." By a treaty executed in 1871, between the United States and Italy, it was stipulated that private property of either nationality should not be seized by the other unless when contraband of war, or for blockade breach. This view is contested by Mr. Hall, § 147.

See for a survey of authorities, Bluntschli, Das Beuterecht, 1878; Moderne

§ 219. Assuming, in accordance with the English view, that an enemy's goods are liable to seizure wherever they may be

Völkerrecht Int., p. 45, § 296; Perels, § 35. To the same effect is a resolution adopted in 1878 by the Institute of International Law.

The English claim of a right to capture not only goods on board the merchant ships of states with which she is at war, but the sailors on board such ships, has been vigorously combated by Prince Bismarck. See Perels, § 35.

"The declaration of Paris, 1856," says Dr. Woolsey (Int. Law App., iii., note 25), "by which the neutral flag covers enemies' goods, destroyed the force of the rule of 1756, for the new rule protects neutral trade in innocent articles between two hostile ports, whether such trade had been opened to neutrals in time of peace or not. The rule is expressed in the most general terms. But, although this rule is obsolete, and has gone into history for the most part, the United States, not being a party to the above-mentioned declaration, may yet be under the operation of the old British law in regard to coasting and colonial trade. Here two questions may be asked, the one touching the lawfulness of coasting trade proper, the other touching the conveyance by neutrals of their goods, brought out of foreign ports, from one port of the enemy to another. Our government has contended for the right of neutrals to engage in both descriptions of trade, if we are not in an error, while some of our publicists hold the first to be reasonably forbidden, the other to be allowed. Judge Story says (Life and Letters, i. 285–289) that, in his private opinion, 'the coasting trade of nations, in its strictest character, is so exclusively a national trade, that neutrals can never be permitted to engage in it during war without being affected with the penalty of confiscation. The British have unjustly extended the doctrine to cases where a neutral has traded between ports of the enemy with a cargo taken in at a neutral country.' He is 'as clearly satisfied that the colonial trade between the mother-country and the colony, where that trade is thrown open merely in war, is liable, in most instances, to the same penalty. But the British have extended their doctrine to all intercourse with the colonies, even from or to a neutral country, and herein, it seems [to him], they have abused the rule.' There seems to be reason for such a difference. To open coasting trade to neutrals is a confession of inability to carry on that branch of trade on account of apprehensions from the enemy's force, and an invitation to neutrals to afford relief from the pressure of war. It is to adopt a new kind of vessel, on the ground that they cannot be captured. The belligerent surely has the right to say that his attempts to injure his enemy shall not be paralyzed in this manner. But he has no right to forbid the neutral to carry his own goods from hostile port to hostile port, when he might have done it before. Every right of innocent trade, then, enjoyed by the neutral in peace, should be allowed after the breaking out of the war; but new rights, given to them on account of the war, may be disregarded by the belligerent as injuring his interests.

"Hautefeuille remarks, on the other side, that the sovereign who can interdict can also permit a certain kind of commerce. But this is begging the question. Can he, by such privileges,

found, it becomes an interesting question to determine what persons are to be regarded as "enemies" in this sense. Subjects of a sovereign at war with England are unquestionably, on the English hypothesis, enemies whose goods are open to seizure at sea; and as subjects are to be regarded all domiciled residents. The English courts, however, have gone further, and have held that a person who has acquired a commercial domicil in a land is in this sense a subject; and the rule that to domicil the intention to permanently remain is essential, is so far stretched in prize cases as to treat as domiciled in a land persons residing in such land for the purposes of business.[1] This view appears to be sanctioned by the high authority of Chancellor Kent.[2] "This same principle," he says, "that for all commercial purposes the domicil of the party, without reference to the place of birth, becomes the test of national character has been repeatedly and explicitly admitted in the courts of the United States." "If he resides" (here "domicil" and "residence" are treated as convertible,

English courts hold that doing business in a foreign land constitutes commercial domicil.

restrain his enemy from annoying him —privileges which are nothing but taking the neutral trader into a kind of partnership? Suppose that he hired war-vessels from a neutral sovereign, would that exempt them from capture? Most other continental writers have condemned the rule of 1756, as Ortolan, Kaltenborn, Heffter, in a qualified way, and Gessner."

As differing from the text, see The Hart, 3 Wallace, 559; S. C., Bl. Pr. Ca. 379. That by international law, enemies' goods are protected by neutral flag, see Schwartz *v.* Ins. Co., 3 Wash. C. C. 117.

That shipping goods in an enemy's ship gives presumption that the goods belong to an enemy, see The London Packet, 1 Mason, 14; The Amy Warwick, 2 Blatch. 635.

[1] McConnell *v.* Hector, 3 Bos. & P. 115; The President, 5 C. Rob. 248; Johnson *v.* Falconer, 2 Paine, 601; and cited in Whart. Con. of L. § 70.

As to domicil generally, see *infra*, § 254.

[2] Kent's Com., i. 75; and see Parlin *v.* U. S., 1 N. & H. 174; The Cheshire, 3 Wall. 231; The Amy Green, 1 Gall. 274.

That the property of a trading firm established in an enemy's country is liable as prize, though some of the members have a neutral residence, see The William Bagaley, 5 Wall. 377; though this does not affect the separate property of partners having a neutral residence, ibid.; The Sally Magee, Bl. Pr. Ca. 382; The Aigburth, ibid. 69, 645.

That mere residence in a belligerent nation may impress the character of belligerency, see The Gray Jacket, 5 Wall. 370; The Pioneer, Bl. Pr. Ca. 2, 22,; The Prince Leopold, ibid. 89, 647; The Lilla, 2 Sprague, 177.

which, if the latter term be regarded as defining the rule, would largely extend belligerent rights) "in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences of the neutral trade."[1] Sir Robert Phillimore, on the other hand, evidently accepts this position with reluctance;[2] though it is reaffirmed by Mr. Dicey, who states the distinction to be as follows: "A commercial domicil is such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country.—When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home.—When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there."[3] This is clearly put; and if we accept the position that an enemy's goods may be seized at sea wherever found, gives us at least a line of demarcation readily understood and easily applied. It is, however, to be regretted that the term "domicil" should be adapted to conditions so different as residence with intention to establish a permanent home, and residence with intention to engage in business. The rejection of this distinction renders still more objectionable the claim of belligerents to seize an enemy's goods at sea. If by an "enemy" is to be considered any one who by his business contributes to the resources of an enemy's country, it would be hard for any goods on the high seas, in any way related to a belligerent country, to escape the meshes of the net of the other belligerent.[4] And even were we to hold that a com-

[1] To this he cites The Chester, 2 Dall. 41; Maley v. Shattuck, 3 Cranch, 458; The Venus, 8 Cranch, 253. To the same effect, see The William Bagaley, 5 Wall. 377; The Cheshire, 3 Wall. 231.

[2] Phill., iv. p. 169.

[3] Dicey on Domicil, p. 345; see, further, Whart. Con. of Law, § 70.

[4] That a principal who does business through an agent in a foreign land is "sufficiently invested with the na-

mercial "domicil" of this kind stamps the party accepting it with the political character of the country in which he does business, the more reasonable view is that if he engage in such business in times of peace, this "domicil," if not adopted as final, ceases when the sovereign of such country enters into a war which could not have been contemplated by the party when he engaged in the business.[1] But where a merchant elects to put his goods in a country engaged in war, he impresses such goods, according to the English view, with the political character of such country; and this "allows a merchant to act in two characters, so as to protect his property connected with his house in a neutral country, and to subject to seizure and forfeiture his effects belonging to the establishment in the belligerent country."[2]

tional character by the residence of his agent," is asserted by Chancellor Kent on the authority of The Anna Catharina, 4 C. Rob. 107; and of The San Jose Indiano, 2 Gallis. 268; The Venus, 8 Cranch, 253.

[1] This is the position taken by Marshall, C. J., in The Venus (8 Cranch, 253), dissenting in this respect from the majority of the court, who held to the English view. Chancellor Kent (Com., i. 79) and Mr. Duer (Ins., i. 498) vindicate the dissenting opinion of the chief justice; Chancellor Kent saying "there is no doubt of its superior solidity and justice." And even by the English courts a person doing business in a land in which he is not naturalized is allowed, on the breaking out of war, a reasonable time to leave such land, and dissolve his business relations. The Gerasimo, 11 Moore, P. C. 88; The Ariel, ib. 119; see, for parallel cases in this country, The William Bagaley, 5 Wall. 377; The Gray Jacket, 5 Wall. 370.

[2] 1 Kent's Com., 81; citing The Portland, 3 C. Rob. 41; The Jonge Klassina, 5 C. Rob. 297; The San Jose, 2 Gallison, 265.

In a letter from Mr. Hoffman to Mr. Evarts, dated at St. Petersburg, April 14, 1879 (Foreign Relations U. S. 1879, 913), we have the following:—

"It appears that an American citizen residing in Turkey suffers injury from the Russians, then at war with Turkey. The treaty of 1832 applies exclusively to Americans residing on Russian territory. I am unable, therefore, to bring this case within the purview of the treaty.

"On the other hand, I find it laid down in the books that the property of a foreigner residing and doing business on a belligerent's territory, is, so far as the other belligerent is concerned, *hostile* property, and may be treated like that of a native. He pays taxes, may be called upon for military service, and contributes in various ways to the strength of the country of his residence.

"Baptiste Guillem was a French cook, residing in Mexico at the commencement of our war with that country. He left it immediately on the breaking out of the war, on his return to France, and was captured by our fleet with his property. In the opinion delivered by

§ 220. Assuming that goods at sea are liable to be seized by an enemy, it is settled that while *in transitu* they cannot be assigned in such a way as to relieve them of such liability. "When war is existing or impending, the belligerent rule applies, and the ownership of the property is deemed to continue as was at the time of the shipment until actual delivery;"[1] ough this right ceases when the property reaches its destiion.[2] On the same principle, it has been held that property the ocean cannot be burdened with liens so as to elude ptors.[3] Even a *bona fide* mortgagee not in possession has en held to have no title which he can set up against capre.[4]

zable perty not es- e seizure assign- nt.

ief Justice Taney (United States *v.* illem, 2 Howard) he says:—

'The hostile character which his nicil in Mexico had imposed upon n and his property had therefore n thrown off, and as soon as he led from Vera Cruz he recovered the aracter of a French citizen, and as h was entitled to the rights and vileges of a neutral in regard to his perty, as well as in his person.

'Had he not left Mexico, therefore, property would have remained *hos* property, and he would not have n entitled to the rights and privies of a neutral.

'Mr. Dutilth, an American citizen, ided in Holland in 1794, when Great tain was at war with Holland. His perty was captured, part of it be he went to Holland, and part dur his residence there. The former s restored to him; the latter was demned, upon the ground that while was a neutral resident of Holland property was hostile property (the nnibal and Pomona, Lords, 180 *a*), d the same principle was laid down Mr. Justice Washington in the case 'enus (8 Cranch).

If I am not mistaken, too, in the United States we have always refused to admit the claims of foreigners domiciled in the southern states during our war for damage to their property. An exception was made in favor of British subjects, but this exception was specially secured to them by the treaty of Washington, and we were supposed to have received an equivalent for it. In France damage done to property in Paris during the commune was paid for; but this I take to have been upon the principle that the municipality is liable for the acts of a mob and for injuries committed by the authorities in putting down the mob."

As to the domicil which determines national character, see The San Jose Indiano, 2 Gall. 268; 1 Mason, 38; The Mary Clinton, Bl. Pr. Ca. 556; The Sarah Starr, Bl. Pr. Ca. 69.

[1] Anna Catharine, 4 C. Rob. 112; The Frances, 1 Gallison, 453; 8 Cranch, 335; Sally Magee, 3 Wall. 451.

[2] The Baltica, 11 Moore, P. C. 141; Baltazzia *v.* Ryder, 12 Moore, P. C. 168.

[3] The Frances, 8 Cranch, 335, 359; Sally Magee, 3 Wall. 451.

[4] The Hampton, 5 Wall. 372.

§ 221. It is necessary, in order to place the members of an army under the protection of the law of nations, that it should be commissioned by a state. If war were to be waged by private parties, operating according to the whims of individual leaders, every place that was seized would be sacked and outraged; and war would be the pretence to satiate private greed and spite. Hence, all civilized nations have agreed in the position that war to be a defence to an indictment for homicide or other wrong, must be conducted by a belligerent state, and that it cannot avail voluntary combatants not acting under the commission of a belligerent.[1] But free-booters, or detached bodies of volunteers, acting in subordination to a general system, if they wear a distinctive uniform, are to be regarded as soldiers of a belligerent army.[2] This was accorded to the partisans of Marion and Sumter in the American Revolution, they being treated as belligerents by Lord Rawdon and Lord Cornwallis, who were in successive command of the British forces in South Carolina; by Napoleon to the German independent volunteers in the later Napoleonic campaigns; and by the Austrians, at the time of the uprising of Italy, to the forces of Garibaldi.[3] There must, however, be a military uniform, and this test was insisted on by the government of the United States in its articles of war issued in 1863, and by the German government in its occupation of France in 1871.[4]

Guerillas, when internationally sanctioned.

[1] See *supra*, §§ 144, 178, 210.

[2] See Bluntschli, 3d ed., §§ 512, 570.

Mr. Field, in his proposed code, thus speaks:—

§ 736. The following persons, and no others, are deemed to be impressed with the military character:—

1. Those who constitute a part of the military forces of the nation; and,

2. Those who are connected with the operations thereof, by the express authority of the nation.

[3] Lawrence's Wheaton, Elem. of Int. Law, p. 627, pt. iv., ch. ii. § 8; Dana's Wheaton, § 356; Bluntschli, Droit Int. Codifié, § 569, cited by Field, *ut sup.*

[4] The same privileges attach to subsidiary forces, camp followers, etc. But ununiformed predatory guerilla bands are regarded as outlaws, and may be punished by a belligerent as robbers and murderers. Halleck, Int. Law and Laws of War, 386, 387; Heffter, Droit International, § 126; 3 Phillimore's Intern. Law, § 96; Lieber's Instructions for the Government of Armies of the United States, section iv. But if employed by the nation, they become part of its forces. Halleck, p. 386, § 8; adopted by Field, *ut supra.*

Fioré, as cited by Field, says that the army, which may consist of regulars, volunteers, mercenaries, troops of al-

§ 222. When an invading army withdraws, the condition of things existing before the occupation is restored. By the Roman law this restitution, so far as the return of goods is concerned, is spoken of as *postliminium*, to be discussed in the next section. After the withdrawal of military government, at the close of the late civil war, it was held that the authority of the civil courts revived.[1] When an invader withdraws from an invaded foreign country, that country is left to the reorganization of its own institutions.[2]

On withdrawal of an invasion, old system is revived.

§ 223. The *jus postliminii*, or right of postliminy, as it sometimes is called, is the right of the owner of recaptured goods to be restored to their possession. If, for instance, my goods are seized by foragers of an invading army, and these foragers are promptly driven back and the goods taken from them by an armed force of my own country, I am entitled to have my goods restored to me.[3] There are, however, several qualifications of this right:—

Jus postliminii is right of the owner of recaptured property to be restored to its possession.

(1) It cannot be exercised in the territory of a neutral state,

lies, etc., must be organized, disciplined, and subjected to the command of the public authority. Fioré, Nouveau Droit International, v. ii. p. 277.

"As to the status of franc-tireurs during the Franco-German war, 1870, Count Bismarck declared to the French government that 'only men who can be recognized within gunshot, as soldiers, shall be considered and treated as such;' and 'that all those who, not being on all occasions and at a proper distance recognizable as soldiers, may kill or wound any Prussians, shall be tried by court-martial.' Foreign Relations of the United States, 1870, p. 142." Field, *ut supra*.

"Inhabitants of a country invaded, who spontaneously unite in arming to oppose invasion, or who, under military organization, and for political reasons, without motives of private gain, take part in hostilities existing between belligerents, are not to be treated as criminals, unless after being required by the enemy to lay down their arms or to join the regular military forces within a reasonable time, they fail to do so." Field, § 787.

Bluntschli, § 570, treats as belligerents such volunteer bodies as those which Garibaldi led on his own authority in the Italian wars of 1859 and 1866. Lieber, in his Instructions, takes a stricter view.

[1] *Ex parte* Milligan, 4 Wall. 2; see *supra*, §§ 37, 38.

[2] *Supra*, § 137 *et seq.*

[3] Vattel, b. 3, c. 14; 1 Kent's Com., 168; Hall, Int. Law, § 162.

since a neutral state necessarily regards all captures by belligerents as equally legal.[1]

(2) The recapture must be prompt. After twenty-four hours, goods seized in a land war vest in the captor, so far, at least, as to give title to those by whom the goods are recaptured.

Difficult questions arise as to the disposition of property seized by the invader in conformity with the law of nations. If the invader is authorized to make such seizure, he is authorized to pass title to the goods seized, and to such goods in the hands of *bona fide* purchasers from the invaders, *postliminium* does not apply.[2]—Real property is not affected by the limits imposed on the title to goods. When land is occupied by an invader, his title is not regarded as complete until ratified by the treaty of peace. When so ratified, if the land is alienated by the conqueror, the alienee, according to the prevalent opinion, takes title subject to the contingencies of a reconquest, in which case the title reverts to its former owner.[3] In any view, a treaty of peace extinguishes the right of postliminy in parties who might by such right have recovered property during the pendency of war.[4]

§ 224. By the statute law of England, when ships or goods captured at sea by an enemy are recaptured during the war, they are to be restored to the original owner, on paying salvage. The same right is reserved to

Maritime law restores captured prop-

[1] See McDonough *v.* Dannery, 3 Dallas, 188; Josefa Segunda, 5 Wheat. 388.

[2] Holtzendorff, *ut sup.*, citing Eichelman, Ueber die Kriegsgefangenschaft, 1878.

That the *jus postliminii* does not subject intermediate importations liable to duty to the recovering sovereign, see U. S. *v.* Rice, 4 Wheat. 246; U. S. *v.* Hayward, 2 Gall. 485.

In the Roman law the *jus postliminii* was the right of a person returning from captivity, not only to recover his former *status*, but to have restored to him the goods taken from him by the enemy, but recaptured from the enemy. "Postliminium fingit eum, qui captus est, semper in civitate fuisse; dictum est autem postliminium a limine et post, ut eum, qui ab hostibus captus in fines nostros postea pervenit, postliminio reversum recte dicimus." § 5, i. 1, 12, tit. D. 49, 15, c. 8, 51.

By an ordinance of the Continental Congress the *jus postliminii* was limited to "a recapture within twenty-four hours." The Resolution, 2 Dall. 4.

[3] Vattel, b. 3, c. 7, § 132; 1 Kent's Com., 111.

[4] Vattel, b. 3, c. 14, § 216; Schoone Sophie, 6 C. Rob. 139.

erty on paying salvage.

allies of England who act according to the same liberal principles.[1] The salvage is awarded as a matter of right to the recaptor.[2] By the act of congress of June 30, 1864, ch. 174, § 29, salvage is allowed in all cases of restoration (which must be before condemnation) of vessels or other property recaptured by United States forces from captures by an enemy. But to such cases the law of *postliminium*, in its technical sense, does not apply. "If a prize be brought into a neutral port by the captors, it does not return to the former owner by the law of postliminy, because neutrals are bound to take notice of the military right which possession gives, and which is the only evidence of right acquired by military force as contradistinguished from civil rights and titles. . . . All captures are to be deemed lawful, and they have never been held within the cognizance of the prize tribunals of neutral nations."[3]

XIV. Contraband.

Articles contraband of war may be forfeited

§ 226. There are two classes of goods as to which no question can arise in this connection. The first comprises things that could not possibly be used for warlike purposes, *e. g.*, books in no way connected with war, articles of family dress, etc. The second comprises articles which could not be used for any but warlike purposes, *e. g.*, cannon, torpedoes, and firearms so constructed as to be fitted only for military use. Between these two classes fall innumerable articles, whose character in this respect depends upon the concrete case. Iron, for instance, would not be ordinarily contraband; but if it be forwarded to a cannon foundry belonging to a belligerent to be made up into cannon, and if the whole transaction be for the purpose of thus applying the iron, then the iron in this particular case would be contraband. On the other hand, it may be said that from the nature of things powder is contraband of war; yet in a great country like the United States, where there are so many uses to which powder can be put beside that of the battlefield, it

[1] The Santa Cruz, 1 C. Rob. 50.

[2] The Two Friends, 1 C. Rob. 271.

[3] Kent's Com., i. 109.

would be absurd to say that sales of powder in large masses from a powder mill are contraband, though it was probable at the time that some portion of the powder so sold would pass into belligerent hands. Coal, also, may be the subject of lively controversy in this relation.[1] It is certainly no breach of neutrality to sell coal for use on a belligerent steamer visiting the port of sale casually under distress of weather. But it would plainly be a breach of neutrality to establish a coaling depot to supply all steamers of a belligerent which might desire to be thus aided. The fact is, that unless in the two extreme cases above noticed, each case, if not determined by treaty, must depend upon the particular facts. It should be added that personal service—locatio operis—may be contraband of war; and in this sense negro slaves of a belligerent were held in the late American civil war to be contraband, and liable to capture and liberation as such.[2]

[1] *Infra*, § 251; see Whart. Crim. Law, 8th ed., §§ 1901 *et seq.*

[2] Holtzendorff, 1252, citing Moseley on Contraband of War, 1861; Marquardson, Der Trentfall, 1862; Westlake in Revue de Droit International, ii. 614; Lehman, Kriegscontrebande, 1877; Gianquinto, Della Confisca per Contrabando, 1872; see to same effect, Perels, § 45; Phillimore, iii., § 266; Bluntschli, § 805; Gessner, 12th ed., 82.

That articles contraband may be seized on neutral ships, see The Peterhoff, 5 Wallace, 28.

As to seizure of insurgent's goods, see *infra*, § 455.

As to seizure of cotton, see *supra*, § 216.

In The Jonge Margaretha, 1 C. Rob. 189, it was held by the English admiralty court that the scope of contraband prohibitions varies with the circumstances of the times. Thus, in 1747, butter, salt fish, and rice were held to be contraband; though the prevalent rule is now held to be that provisions which are not likely to be used for the military aid of a belligerent are not contraband. See The Commercen, 1 Wheat. 382. Whether neutrals are precluded by the law of nations from furnishing articles contraband of war to a belligerent, see *infra*, §§ 238 *et seq.*

The United States, in treaties negotiated in the two administrations of Washington and Adams, classed munitions of war, horses, sulphur, and saltpetre, as contraband; while provisions, coin and metals, ships and articles of naval construction, were excluded from the category. In response to the English instructions of June, 1793, it was insisted that provisions can only be contraband when sent to a place actually invested. Mr. Randolph to Mr. Hammond, May 1, 1794; Am. State Papers, i. 450. It is true, that subsequently the supreme court held that provisions "destined for the army or navy of the enemy, at his ports of naval equipment," are contraband. The Commercen, 1 Wheat. 387; see Maissonnaire *v.* Keating, 2 Gall. 335. But while one

§ 227. As to whether confiscation is to extend beyond specific contraband goods, several distinctions have been taken. Ortolan holds that the entire cargo can be confiscated:—

belligerent may seize provisions on their way to the other belligerent's ships, the mere fact that a belligerent should conclude that certain provisions may fall into hostile hands will not justify him in confiscating such provisions as contraband.

According to Chief Justice Chase (The Peterhoff, 5 Wall. 58), contraband goods are divided into three classes: "Of these the first consists of articles manufactured, and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes."

"Merchandise of the first class destined to a belligerent country, or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

Artillery, harness, men's army bluchers, artillery boots, government regulation gray blankets, are of the first class. Id.

Contraband is liable to capture when destined to the hostile country or to the actual military or naval use of the enemy (according to the above rule), whether a violation of blockade be intended or not. Id.

Dana, in his notes to Wheaton, gives the following statement:—

"The principal point in dispute is as to articles admitted to be of ambiguous or uncertain use, when in the enemy's country and in time of war."

"One class of writers contends for an absolute rule as to all articles of such descriptions; so that if upon the application of the general test, they are left *ancipitis usus*, they must be free, and no further inquiry can be made for the purpose of ascertaining the probable use in the particular case. Another class of writers contends, that as to such articles inquiry may be made into the circumstances, for the purpose of determining their probable use in the particular instance. The latter rule has been unquestionably the British doctrine, enforced by her orders in council and prize courts, recognized in her treaties, and sustained by her statesmen and text-writers. Reddie on Maritime Intern. Law, ii. 456; Phillimore's Intern. Law, iii. 245–284; Wildman's Intern. Law, ii. 210 *et seq.*; Manning's Law of Nations, 282 *et seq.*; Mosely on Contraband, passim. It may also be said, in the main, to have been the American doctrine." Kent's Commentaries, i. 140; Halleck, Intern. Law, 569–590; Woolsey, Intern. Law, §§ 180, 181.

"Of the continental writers, Hautefeuille contends for the absolute rule limiting contraband to such articles as are in their nature of first necessity for war, substantially exclusively military in their use, and so made up as to be capable of direct and immediate use in war. (Tit. 8, § 2, tom. ii. pp. 84, 101, 154, 412; tom. iii. p. 222.) Ortolan is of the same opinion, in principle; and contends that all modern treaties limit the application of contraband to articles directly and solely applicable to war; yet he admits that certain articles not

1. When three-fourths of it are contraband.
2. When the non-contraband articles belong to the owner of the contraband.

In cases of conspiracy ships may be confiscated.

actually munitions of war, but whose usefulness is chiefly in war, may, under circumstances, be contraband; as sulphur, saltpetre, marine steam machinery, etc.; but coal, he contends, from its general necessity, is always free. (Tom. ii., ch. vi. 179–206.)"

"Massé (Droit Comm., i. 209–211), admits that the circumstances may determine whether articles doubtful in their nature are contraband in the particular case, as the character of the port of destination, the quantity of goods, and the necessities and character of the war. The same view is taken by Tetens, a Swedish writer (Sur les Droits Reciprogues, pp. 111–113). Hubner (lib. ii., ch. i., §§ 8, 9), seems to be of the same opinion with Tetens and Massé."

"Klüber (§ 288), says that naval stores are not contraband; but adds, that in case of doubt as to the quality of particular articles, the presumption should be in favor of the freedom of trade."

"The subject is not affected by the Declaration of Paris, of 1856." Dana's Wheaton, note 226, p. 629.

The English courts treat as goods absolutely contraband, ammunition and materials for ammunition; military and naval equipments and stores; Charlotte, 5 C. Rob. 305; hemp, cordage, and other materials for fitting up shipping; Neptunus, 3 C. Rob. 329; 6 C. Rob. 408; and steam engines and machinery for steamers; Lushington, Prize Law, §§ 169–72.

It has also been held that goods which are the produce of a neutral exporting company are not contraband; but if they are the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, they are not exempt from the contraband character, even though they are destined to a neutral country. The Commercen, 1 Wheat. 382; see Maissonnaire *v.* Keating, 2 Gall. 325; The Stephen Hart, Blatch. Prize Cases, 387; The Springbok, id. 434; The Peterhoff, id. 463, 528, 620.

It has also been ruled that printing presses, materials and paper, and postage stamps, belonging to the enemy, and intended for its immediate use, are contraband. The Bermuda, 3 Wall. 514, 552.

"The doctrine of occasional contraband received its widest extension in the war of England against revolutionary France. The British representative to our government claimed in 1793 and 1794, that by the law of nations all provisions were to be considered as contraband, in the case where the depriving the enemy of these supplies was one of the means employed to reduce him to reasonable terms of peace, and that the actual situation of France was such as to lead to that mode of distressing her, inasmuch as she had armed almost the whole laboring class of the people for the purpose of commencing and supporting hostilities against all the governments of Europe. If a government had armed nearly its whole laboring population the laws of political economy would probably reduce it to weakness far sooner than the cruisers of its enemy would have that effect." Woolsey, Int. Law, § 182.

3. When there are false ship papers.[1]

The second of these positions is adopted by Phillimore.[2] But the other rules are too arbitrary and artificial to be sustained, and even this is open to grave doubt.[3] Nor should the ship be confiscated unless it appear that the captain or owner was in a conspiracy with the owner of the contraband goods, to forward them to the enemy.[4]

[1] Op. cit., ii. 197.

[2] Op. cit., iii. § 277.

[3] Perels, § 46.

[4] See The Standt Embden, 1 C. Rob. 26; The Franklin, 3 C. Rob. 217; The Ranger, 6 C. Rob. 125.

In 1879, during the war between Peru and Chili, the steamer Luxor, of the German navigation line between Hamburg and Callao, received, with other merchandise, at Montevideo, three hundred and forty-two packages loaded in the name of A. Kampmann, addressed to Agustin Edwards, marked "contenu nonconnu"—"contents unknown." The packages contained arms and munition of war, to be disembarked at Valparaiso. When the Luxor arrived at Valparaiso, after these articles of contraband of war were disembarked, the captain of the Luxor visited the consul-general of the German empire and presented a declaration to the effect that he was ignorant of the contents of the cases, that no communication had been made to him in this relation, and that if he had known the contents he would not have received them. The declaration was received and attested by the consul on May 9, 1879, and the Luxor continued on her voyage, stopping at the several Chilian and Peruvian ports which were on her route. When she arrived at Callao, she was seized by the order of the government of Peru, and taken before a prize court, on the charge of having violated neutrality in having transported from Montevideo to Valparaiso arms and ammunition destined to aid Chili in the war against Peru. During the proceedings, the Peruvian ministry requested from the College of Advocates, and from other special authorities, an opinion as to the question at issue. M. Pradier-Fodéré, an eminent publicist of Lima, gave an opinion adverse to the right of confiscation. The contraband of war, he argued, had escaped process; it had been landed, and the ship had then proceeded on her course. The modern tendency of international law, so he insisted, is to restrict the right of confiscation of vessels carrying contraband of war; and this right is denied by almost the entire Italian school, and by a large section of French and German publicists. In this view coincide Fioré, Vidari, de Gioannis, Massé, Bulmerincq, Hautefeuille, Ortolan, Pinheiro-Ferreira, Klüber. Mr. Westlake, also, is cited to the effect that in principle the transport of articles contraband of war does not constitute an act of hostility. If it is not an infraction of the law of nations for a neutral to permit the sale to foreign countries of contraband of war, it is not an infraction of the law of nations for a neutral to transport such articles when sold; and Peru, in its code, has prohibited neither the sale nor the transportation of such articles. Aside from this point, it was urged that war does not suspend the commerce between

§ 228. By recent high authorities the extension of the category of contraband has been advocated so as to include neutrals and belligerents; and, though the contraband of war of one belligerent can be seized whenever found by the other belligerent, transportation does not taint the ship at least after the goods are discharged. The exceptional cases in which confiscation of the ship is sustained by Heffter, Bluntschli, and Woolsey, are the following:—

(1) When the ship is exclusively employed in carrying contraband of war;

(2) When the proprietor of the ship knew that the ship was to carry contraband;

(3) When the contraband formed a material part of the cargo;

(4) When the ship and the remaining cargo belonged to the owner of the contraband;

(5) When the transaction was covered by fraudulent papers and false entries;

(6) When the ship was itself contraband of war;

(7) When the ship belonged to a party expressly bound, by the treaties existing between his country and the country confiscating, to abstain from furnishing such articles to the enemy;

(8) When the ship resisted the exercise of belligerent rights on the contraband.

The Luxor, it was argued, did not fall within any one of these exceptions.

M. Pradier-Fodéré conceded that the captain's good faith could be impeached, but that even if it was shown that he knew of the state of the war and the contents of the packages, this did not impute knowledge to the European owners. On the question of false papers, M. Pradier-Fodéré thus speaks:—

"Quant à la question des circonstances frauduleuses, de faux papiers et de fausse destination, je ne pensais pas qu'elle pût être résolue affirmativement contre le Luxor, en se fondant sur ce que le connaissement et l'ordre d'embarquement portaient la mention de '*contenu non connu.*' Assurément il était impossible de croire que le capitaine n'eût pas connu le contenu des 342 caisses, et, s'il l'avait ignoré, il eût été très-coupable, il eût manqué aux devoirs les plus élémentaires de sa profession. Mais, où voir les faux papiers? Où, la fausse destination? Je voyais l'indication *très incomplète* d'une destination *équivoque*, mais je ne voyais rien de plus autorisant une expropriation aussi grave que la confiscation d'un navire."

On the question of the practice of the great powers in respect to confiscation, M. Pradier-Fodéré makes the following striking remarks:—

"J'avouerai que la conduite tenue par les États de premier ordre n'a pas pour moi une grande valeur. Je me suis habitué, depuis que je lis l'histoire, à voir tant d'iniquités commises par les puissances prépondérantes, que la conduite des grands Etats, dans les questions internationales, exerce peu d'influence sur mon esprit. Si je voyais des usages constamment suivis, en vertu de principes tellement universellement ou même généralement adoptés, qu'on pourrait les considérer comme une règle tacite du droit des gens, je ferais un grand cas de cette base de décision; mais ce n'est pas ce qui arrive le plus souvent. Les pratiques des États varient beaucoup sur

what may be called constructively contraband (uneigentliche Kriegs-contrebande, contrebande par accident). Under this head are enumerated:—

Question as to despatches and diplomatic agents.

(1) Despatches forwarded by a neutral on behalf of a belligerent, by which belligerent operations are furthered.[1]

(2). Vessels of transport, by which the soldiers or sailors of a belligerent may reach him.[2]

la même question donnée; et, ce qu'il y a de décourageant, c'est que trop fréquemment la même puissance contredit le lendemain ce qu'ell a pratiqué la veille. C'est une affaire de politique, c'est-à-dire, d'appréciation des opportunités, de conscience de sa propre force ou de sa propre faiblesse. Il est certain que si je pouvais dire: les Etats faibles ont la coutume d'exercer le droit de confiscation, dans des cas plus ou moins pareils à celui du Luxor, sans que les États forts élèvent la moindre réclamation, il y aurait là un exemple d'une encourageante autorité; mais à quoi servira-t-il au Pérou que je déclare à son gouvernement que l'Angleterre, que l'Allemagne, que les États-Unis d'Amérique ont quelquefois confisqué des navires porteurs de contrebande de guerre, dans des circonstances à peu près semblables? Le Pérou est-il les États-Unis d'Amérique? Est-il l'Allemagne? Est-il la Grande Brétagne?"

The prize court of Peru decided, however, in favor of the confiscation of the Luxor, and the then government determined to retain and appropriate the vessel in obedience to this decree. This, however, was corrected by the "Révolution de décembre qui renserva la constitution et permit a M. de Piérola de saisir la dictature." And one of the first acts of M. Piérola was to return the Luxor to the German Transportation Company.

[1] Perels, § 47; Gessner, 12th ed., 115.

[2] Gessner, 12th ed., 115, rejects this position, and is sustained by several French and German authorities. That despatches, however, are contraband is maintained in England, and was assumed by the United States in the late civil war.

In a case in New York, where official despatches of importance were sent from Batavia to New York, and there given unofficially, without notice of their nature, to the master of a United States ship, to be sent to a private person in France, the ship was released upon the captain testifying under oath that he was ignorant of the nature and contents of the letters. The Rapid, Edwards, 228. On the other hand, the English courts have held, with undue harshness, that a vessel is not exempt from confiscation for carrying such despatches, even where it was involuntarily pressed into the belligerent service by force, or where the character of the despatches was fraudulently concealed. The Carolina, 4 C. Rob. 259; The Orazembo, 6 C. Rob. 436. Sir R. Phillimore, iii., § 272, sustains these cases, which Mr. Hall dissents from, p. 593. Bluntschli (§ 803) maintains that military despatches (*e. g.*, orders of a commanding officer to a subordinate to carry on military operations) are unquestionably contraband, but that it is otherwise with despatches professing pacific ne-

(3) Vessels transporting to their place of destination diplomatic agents of a belligerent, such agents being known by the officers of the vessel to be on a belligerent errand. The last point was made by Mr. Seward when surrendering to the British government Messrs. Mason and Slidell, Confederate diplomatic agents, whom Captain Wilkes, commanding the United States war steamer San Jacinto, had seized on the English postal steamer Trent against the captain's protest, when on their way from St. Thomas, a neutral port, to England. The British government promptly and peremptorily demanded the surrender of Messrs. Mason and Slidell, and had this been refused, war would unquestionably have ensued. Mr. Seward acquiesced in the demand, putting his acquiescence on the ground that the capturing officer should have referred the question to a prize court, but stoutly insisting that the "captives" were "contraband." At first the capture was supported, not merely by popular feeling throughout the north, but by the opinions of some of the most eminent lawyers; and it is

gotiations, which are to be regarded as diplomatic correspondence. See cases noted in Wheaton, § 504, Dana's note. In the Tulip, Fisher's Pr. Cas., 26, it was held that a neutral ship may, by the law of nations, carry despatches from a minister resident in the neutral country to the ports of the belligerent in the country to which the minister belongs. If stopped on the high seas by the other belligerent, however, the duty of the ship's master, it was held, is to deliver up the despatches to the arresting belligerent.

The following is from Mr. Field's proposed international code: "§ 861. Documents are contraband, when they are official communications from or to officers of a hostile nation, and fitted to subserve the purposes of the war, but not otherwise.

"Sir William Scott interprets 'despatches,' treated of in the decisions as warlike or contraband communications, to be '*official communications of official persons, on the public affairs* of the government.' The Caroline, 6 Ch. Robinson's Rep. 465. But to this rule there is an exception in the case of communications to or from a neutral nation, or the hostile nation's ministers or consuls resident in the neutral nation."

As to the effect of war upon the *mail service*, see Field, §§ 862, 919.

"Lushington (Naval Prize Law, Introd., p. xii.) says, that to give up altogether the right to search mail steamers and bags, when destined to a hostile port, is a sacrifice which can hardly be expected from belligerents; citing Desp. of Earl Russell to Mr. Stuart, November 20, 1862: Parliamentary Papers, No. Amer., No. 5, 1863." Ibid. § 862.

As to arrest of diplomatic agents, see *supra*, § 168.

an interesting fact that at a meeting held in Boston shortly after the capture was reported, Chief Justice Bigelow, of Massachusetts, a judge both cautious and capable, declared that Captain Wilkes's action was fully justified by international law. There is, indeed, more ground than is now generally admitted for sustaining this contention. It is agreed on all sides that the right of search may be exercised in war;[1] and that a vessel carrying contraband despatches may be arrested, and, as will presently be seen, will be condemned in a prize court, according to the English rule, even if the officers be ignorant of the nature of the despatches, and, according to our rule, if any complicity be established. It may well have been argued, in the Trent case, that for the Trent to carry diplomatic agents of the Confederacy would expose the vessel to condemnation as much as would have been the case if the vessel simply carried despatches. To this, however, the answer is twofold. In the first place, the better opinion is that diplomatic agents, sent by a belligerent to a neutral, are not contraband, since it is always allowable for a neutral to maintain diplomatic relations with a belligerent, and the mission of such agents may be one of peace as well as one for the promotion of hostilities.[2] If this position, which is now generally accepted, be correct,[3] it is no answer that the Confederate states were not belligerents. England formally recognized them as such, and this recognition was based on the fact that the United States had blockaded the ports of the Confederate states, and had negotiated with the Confederate states treaties for exchange of prisoners, both of which acts implied a recognition of belligerency.[4] In the second place, even supposing that the Confederate envoys

[1] *Supra*, § 195. As sustaining the capture see article in North American Rev., July, 1862, by Prof. Joel Parker.

[2] See Bluntschli, § 817; Revue marit. et col., vol. xix. § 14; Gessner, 12th ed., 122, states that Prussia, Austria, and France protested against the seizure. As to general right to arrest, see Heffter, § 161 *a*; Perels, § 47. That *persons* cannot be contraband of war is maintained by Mr. Hall, 600; by Mr. Montague Bernard, 224; and by Marquardson, Der Trentfall, where the whole question is discussed.

[3] *Supra*, § 165; *infra*, § 229.

[4] That this belligerency had been actually recognized by the United States, see §§ 141, 165, 217.

were contraband, the proper course would have been to have taken the Trent to a prize court for condemnation. The determination of the question of contraband in such case was for a court constituted in conformity with the law of nations, and could not be assumed by the officers of the arresting cruiser. At the same time it is an international offence for a neutral to carry knowingly to and fro the diplomatic agents of one of the belligerents whose object is the furtherance of the war.[1] And in case a neutral ship is knowingly lent to such transport, whether of despatches or of soldiers, or, it may be, of agents engaged in furthering the war, confiscation may be adjudged.[2]

[1] See the valuable criticism by Prof. Montague Bernard, in his work on English neutrality (*cf.* Revue du Droit Int., ii. p. 126), where he agrees that a neutral ship, which carries military or civil agents of a belligerency on board, is exposed to capture if the intention to aid the belligerent plainly appears.

[2] See Phillimore, iii. § 489; Maclachlan, 530; Perels, § 47.

On the Trent question, see further articles in London Quarterly Rev., Jan. 1862. The question is discussed at large by Mr. Lawrence, Com. sur Wheat., iii. 447. And see English parliamentary papers, 1862, North America. No. v. p. 26, and, for other references, *supra*, §§ 163, 195.

Dr. Woolsey (Int. Law, § 184) takes strong condemnatory ground. "The case of the Trent," he says, "in which this and several other principles of international law were involved, may here receive a brief notice. This vessel, sailing from one neutral port to another on its usual route as a packet ship, was overhauled by an American captain, and four persons were extracted from it on the high seas, under the pretext that they were ambassadors, and bearers of despatches from the Confederate government, so called, to its agents in Europe. The vessel itself was allowed to pursue its way, by waiver of right as the officer who made the detention thought, but no despatches were found. On this transaction we may remark: (1) That there is no process known to international law by which a nation may extract from a neutral ship on the high sea a hostile ambassador, a traitor, or any criminal whatsoever. Nor can any neutral ship be brought in for adjudication on account of having such passengers on board. (2) If there had been hostile despatches found on board, the ship might have been captured and taken into port; and when it had entered our waters, these four men, being citizens charged with treason, were amenable to our laws. But there appears to have been no valid pretext for seizing the vessel. It is simply absurd to say that these men were living despatches. (3) The character of the vessel as a packet ship, conveying mails and passengers from one neutral port to another, almost precluded the possibility of guilt. Even if hostile military persons had been found on board, it might be a question whether their presence would involve the ship in

§ 229. The diplomatic agents of a neutral power are entitled to communicate with their sovereign through the military lines of a belligerent who is investing or blockading the place to which they are accredited; and they are further entitled to pass through the military lines of the hostile nation, together with their families, official and personal, when necessary for the purpose of reaching or removing from their respective posts.[1]

Neutral diplomatic agents may communicate with their sovereign through blockade or siege.

guilt, as they were going from a neutral country and to a neutral country. (4) It ill became the United States—a nation which had ever insisted strenuously upon neutral rights—to take a step more like the former British practice of extracting seamen out of neutral vessels upon the high seas, than like any modern precedent in the conduct of civilized nations, and that too when she had protested against this procedure on the part of Great Britain and made it a ground of war. As for the rest, this affair of the Trent has been of use to the world, by committing Great Britain to the side of neutral rights upon the seas."

It may be added that diplomatic negotiations by envoys passing between a belligerent and a neutral may be among the most efficient means of restoring peace; and, aside from this view, the neutral is entitled to maintain permanent official intercourse with both belligerents. Nor is it necessary that the independence of the belligerent, in order to secure these rights of diplomatic representation, should have been acknowledged by the neutral. It is enough that belligerency should be so acknowledged. The fact that a government of a territory having complicated business relations with a neutral state, should be recognized by such neutral as belligerent, entitles the belligerent to send envoys to the neutral. No blame could be attached to England for recognizing the Confederate States as belligerents, since this recognition did not take place until the United States government had practically, as is stated above (*supra*, §§ 141, 165, 217), recognized such belligerency. It is true, a belligerent envoy to a neutral may be seized by the other belligerent when on his way over the latter's territory. But one belligerent cannot invade the territory of a neutral for the purpose of seizing the person of such an envoy; and if the territory of a neutral cannot be invaded for this purpose, a ship of a neutral cannot be visited and searched for the purpose of making such arrest. In resenting, therefore, the arrest of Messrs. Mason and Slidell, and insisting on their restoration, England made at least some progress to the recognition of the doctrine previously and subsequently contended for by the American courts, that a ship is to be regarded (except when carrying goods contraband of war, or contraband despatches) as part of the territory of the state to which she belongs.

That insurgents may have diplomatic relations with neutrals, see *supra*, § 165.

For some interesting details as to the Trent case, see Thurlow Weed's Life, i. pp. 634 *et seq.*

[1] Field's Code Int. Law, § 912, fur-

§ 230. So far as concerns the question of seizure, the destination of goods is determined by the destination of the ship. Even though neutral goods are not intended to remain in a hostile port to which they are bound; yet they are liable to seizure as contraband, or as tainted with blockade running, if in a ship bound for such port. On the other hand, a neutral destination, for a neutral ship, will protect, even by the English rule, neutral goods on such ship from seizure.[1] Contraband goods, to be open to seizure, must be actually in prosecution of voyage to a belligerent port,[2] though the fact of an intention on the part of the owners of the vessel to stop at an intermediate neutral port will not exempt the goods from seizure.[3]

Destination of ship imputed to goods.

XV. Blockade.

§ 233. The declaration of the treaty of Paris that a blockade to be valid must be effective, seems like a *petitio principii*, amounting to little more than the declaration that a blockade to be effective must be effective. But when we recognize the sense given to the word effective,

Blockade must be effective.

ther stating "that in the Franco-Prussian war, during the siege of Paris, the official despatches between the government of the United States and their legation in Paris, were transmitted to and fro, across the lines, by the belligerents, subject, however, to delay imposed by the military forces. Private correspondence and newspapers were also allowed transmission into Paris in the official despatch bag, the former being examined to exclude everything relating to the war, and newspapers being passed on a pledge that they should only be read by the American minister. Foreign Relations of the United States, 1871, pp. 283-287.

"The *right* of the neutral government to communicate with its representative in the besieged city, was not fully conceded by Count Bismarck (ibid., pp. 291, 363), although he was understood by the government of the United States to have conceded it. (Ibid., p. 377.) But his refusal to recognize it was based partly on the plea that a fortified capital was unprecedented (ibid., p. 372), and partly upon the plea that the French Republic had not been recognized by the German powers. (Ibid., p. 365.)

"Perhaps the same right of communication with the hostile nation should be secured to those public agents who under the last article may have undertaken to use their friendly offices in behalf of its members." See Letters on Foreign Rel. U. S., 1871, pp. 293, 371, 403.

[1] Field's Int. Code, § 858; Lushington's Prize Law, § 178.

[2] Hobbs *v.* Henning, 17 C. B. N. S. 791.

[3] The Bermuda, 3 Wall. 514.

both in the Roman and in our own law, this criticism fades away. To agree to perform a duty effectively is a very different thing from agreeing to perform it absolutely; the latter engagement is a guarantee, the former is an engagement to perform the duty unless *casus* intervene.* A carrier, for instance, does not insure against a sudden frost which a prudent person could not foresee, nor against peculiar and extraordinary storms; nor even against defective performance by employés, when this defectiveness arises from extraordinary interferences not to be prognosticated. And so it is with blockades. A blockade to be effective need not be perfect. It is not necessary that the beleagured port should be hermetically sealed. It is not enough to make the blockade ineffective that on some particularly stormy night a blockade-runner slid through the blockading squadron. Nor is it enough that through some exceptional and rare negligence of the officers of one of the blockading vessels a blockade-runner was allowed to pass when perfect vigilance could have arrested him. But if the blockade is not in the main effective—if it can be easily eluded—if escaping its toils is due not to *casus* or some rare and exceptional negligence, but to a general laxity or want of efficiency—then such blockade is not valid.[1] It should be added that the position that the right to blockade is limited

[1] "In some cases where a blockading squadron, from the nature of the channels leading to a port, can be eluded with ease, a large number of successful evasions may be insufficient to destroy the legal efficiency of the blockade. Thus, during the American civil war the blockade of Charleston was usually maintained by several ships, of which one lay off the bar between the two principal channels of entrance, while two or three others cruised outside within signalling distance. This amount and disposition of force seems to have been thought by the British government amply sufficient to create the degree of risk necessary under the English view of international law, although, from the peculiar nature of the coast, a large number of vessels succeeded in getting in and out during the whole continuance of the blockade." Hall, Int. Law, 618, citing Bernard, Neut. of Great Britain, chaps. x. and xii. "If approach for inquiry were permissible, it will readily be seen that the greatest facilities would be afforded to elude the blockade." Field, J., The Cheshire, 3 Wall. 235; S. P., The Spes, 5 C. Rob. 80; The Charlotte Christine, 6 C. Rob. 101. That the president of the United States may declare a blockade without the action of congress, see The Sarah Starr, Bl. Pr. Ca. 69; The Amy Warwick, 2 Sprague, 123; S. C., 2 Blatch. 635.

to fortified places is regarded as no longer tenable.[1] The main object of a blockade is the closing of the ports of a belligerent so as to exclude him from all commercial intercourse, and this is a belligerent right recognized on all sides.[2] Neutral vessels attempting to run such blockade are open to confiscation, on proceedings instituted by the belligerent imposing the blockade. But war-ships of neutrals are not infrequently excepted from blockade, as was the case with the blockades instituted by the United States government of the Confederate ports.[3]—It becomes, in many cases, a difficult

[1] Heffter, § 154; Perels, § 48.

[2] Kent, i. 145; Phillimore, iii. § 285.

[3] Perels, § 48.

Unless the blockade be directed against ingress or egress alone, a vessel violates the law of blockade by any positive act towards entering or quitting, or by showing a clear and speedy intention to enter or leave a blockaded port, except in distress. Field's Code Int. Law, § 892, citing The Coosa, 1 Newberry's Ad. Rep. 393; The Hiawatha, Blatch. Prize Cases, p. 1; 2 Blatch. 635; The Empress, Blatch. Pr. Cas. p. 175; Halleck's Intern. Law, ch. 23, § 23.

Actual necessity, *e. g.*, for repairs, supplies, or shelter, will justify an entrance into a blockaded port; but the burden is on the party setting up the reality and urgency of the necessity. The Major Barbour, Blatch. Prize Ca. 167; The Sunbeam, id. 316, 638, 656; The Diana, 7 Wal. 354.

If it can be fully shown that the purpose to run the blockade had been abandoned, the property is not liable to confiscation because of the previous wrongful purpose. 1 Kent's Commentaries, 147; and see, also, The John Gilpin, Blatchford's Prize Cases, 291, 661.

Unless there be an excusatory treaty stipulation, when a ship knew of the blockade at the time of sailing, her approaching the blockaded port for the purpose of inquiring there, is in itself a consummation of the offence; and amounts to an actual breach. The Cheshire, 3 Wall. 231; The Delta, Blatchford's Prize Cases, 654.

That a sovereign may blockade ports in the control of insurgent subjects, see Prize Cases, 2 Black, U. S. 635; The Mary, Blatchford's Prize Cases, 556, 618.

That a contract to run a foreign blockade is not illegal, see Whart. on Cont. § 480; Chavasse, *ex parte*, 4 D. J. S. 655; The Helen, L. R. 1 Ad. & Ec. 1.

The United States courts pressed the right of arrest to a dangerous extreme in the case of the Springbok (Blatch. Pr. Ca. 380, 434; 5 Wal. 1) during the late civil war. This vessel left London on December 9, 1862, destined for Nassau. She was captured on February 3, 1863, when on the way to Nassau, and 150 miles from that port, by the Federal cruiser Sonoma. The district court of New York condemned both ship and cargo. This decree was reversed by the supreme court of the United States in December, 1866, so far as concerns the ship, but affirmed as to the cargo. There was nothing in the papers seized on the Springbok to show that the intention was to run the

ion to determine whether the attempt to run the blockade de out sufficiently to justify a seizure. It may happen,

le. The British government reviously (on March 13, 1863) d this question to its official l, who, in an opinion signed y Sir R. Phillimore, declared there was nothing to justify the of the barque Springbok and rgo; and that her majesty's ment would be justified in de- ng the immediate restitution of ip and the cargo, without sub- g to any judication by an Amer- ize court." But, notwithstand- s emphatic judgment, the decree supreme court of the United was approved by the mixed ssion instituted at Washington rsuance of the treaty between ritish and the United States ments for the settlement of the in dispute between them. This e remarkable, since in a docu- published in Washington on ber 30, 1873 (cited in Gessner, d., 231), appears the official tions of Mr. Fish, then secretary e, to the counsel of the United in which it is said that the ment approves of all the prize ns given in the United States, *that in the case of the Springbok.* asy to see why Great Britain, s of the seas, should, after the noyance and excitement of the e was over, have approved of rine which sustains the seizure utral vessels and cargoes, not hen running into a blockaded ut when making a voyage be- two ports of the neutral under flag she sails. But that such a e should have been approved supreme court of the United extraordinary, as it is in con- h the maritime policy of the United States; and it is a matter of regret that Mr. Fish's instructions in this respect were not pressed so as to secure the repudiation of the doctrine.

As concurring in this criticism, see Gessner, 12th ed., p. 231.

Bluntschli (p. 469) maintains that the ruling of the supreme court in the Springbok case is more perilous to the rights of neutrals than the doctrine of paper blockade.

The question of the liability of the Springbok to confiscation was the subject of discussion by several members of the Institute of International Law in 1881. (Revue de droit int., xiv. 328.) It was agreed on all sides that the opinions of the supreme court of the United States in this case established a theory entirely novel. At a meeting of the institute at Genoa, in 1882, the question was brought formally up by M. Martens, an eminent publicist and professor in the imperial school of law at St. Petersburg. That the decision of the supreme court on the question could not be sustained was agreed to by all who took part in the discussion; though it was the general sense of those present that it was not within the province of the institute to pass resolutions condemning the action of governments or courts in concrete cases.

"The doctrine of continued or continuous voyages," says Dr. Woolsey, Int. Law, app. iii., n. 27, "which Sir W. Scott, afterwards Lord Stowell, originated, deserves to be noticed, and may be noticed here, although it first arose in reference to colonial trade with another country, carried on by neutrals. As the English courts condemned such trade, the neutrals in the first part of this century, especially shippers and

in cases where a vessel is seized at some distance from the blockaded port, that the allegation of blockade running may be disputed. In such cases it is for the prize court to deter-

captains belonging to the United States, ried to evade the rule by stopping at a neutral port and seeming to pay duies, and then, perhaps, after landing and relading the cargoes, carried them o the mother-country of the colony. The motive for this was, that if the goods in question were *bona fide* imported from the neutral country, the ransaction was a regular one. The courts held, that if an original intenion could be proved of carrying the goods from the colony to the mother-country, the proceedings in the neutral erritory, even if they amounted to anding goods and paying duties, could not overcome the evidence of such inention; the voyage was really a conlinued one artfully interrupted, and the penalties of law had to take effect. Evidence, therefore, of original intenion and destination was the turning-point in such cases. See, especially, the case of the Polly, Robinson's Rep., i. 361–372; the cases of the Maria and of the William, ibid., v. 365–372 and 385–406, and the cases there mentioned.

"The principle of continued voyages will apply when cases of contraband, attempt to break blockade, etc., come up before courts which accept this English doctrine. In our late war many British vessels went to Nassau, and either landed their cargoes destined for Confederate ports there to be carried forward in some other vessel, or stopped at that port as a convenient place for a new start towards Charleston or some other harbor. If an intention to enter a blockaded port can be shown, the vessel and the cargo, as is said in the text, are subject to capture according to English and American doctrine from the time of setting sail. Now the doctrine of continued voyages has been so applied by our supreme court that it matters not if the vessel stops at a neutral port, or unlades its cargo and another vessel conveys it onward, or if formalities of consignment to a person at the neutral port, or the payment even of duties are used to cover the transaction, provided destination to the blockaded port, or, in the case of contraband, to the hostile country, can be established, the ship on any part of its voyage, and the cargo before and after being landed, are held to be liable to confiscation. Or, if again the master of the vessel was ordered to stop at the neutral port to ascertain what the danger was of continuing the voyage to the blockaded harbor, still guilt rested on the parties to the transaction as before. All this seems a natural extension of the English principle of continued voyages, as at first given out; but there is danger that courts will infer intention on insufficient grounds. A still bolder extension was given to it by our courts in the case of vessels and goods bound to the Rio Grande, the goods being then carried up by lighters to Matamoras. We could not prohibit neutrals from sending goods to the Mexican side of that river; but if it could be made to appear that the goods were destined for the side belonging to the United States, that was held to be sufficient ground for condemnation of them; although, in order to reach their destination, they would need overland carriage over neutral territory. See Prof. Bernard's Brit. Neutral., 307–317, and comp. Dana's note 231 on Wheaton, § 508."

To the effect that a blockade once

mine as to the liability of the seized ship. A neutral making the blockaded port from necessity in case of disaster is exempt from capture.[1] A vessel, also, may without liability to condemnation, sail on an alternative destination to a blockaded port, with the intention to go elsewhere if it prove that the blockade is continued.[2]—Whether the possession of a port by the land forces controlling the blockade terminates the blockade has been much discussed. The negative has been held by the supreme court of the United States;[3] the affirmative by the mixed commission appointed under the treaty of Washington at the close of the late civil war.[4]

§ 234. To constitute a binding blockade, it is necessary that the neutral to be affected should have notice that the blockade exists. No particular form of giving notice is requisite.[5]

established and notified is presumed to continue, see The Baigorry, 2 Wall. 474; The Circassian, id. 134.

That sailing from a home port with intent to break a blockade is a breach of blockade, see Fitzsimmons *v.* Ins. Co., 4 Cranch, 185; Yeaton *v.* Fry, 5 Cranch, 335; The Circassian, 2 Wall. 135; The Admiral, 3 Wall. 603. That a blockade must be effectual, see The Peterhoff, 5 Wall. 28; but that it is not vacated by *casus*, such as a storm dispersing the blockading ship, see The Columbia, 1 C. Rob. 154; The Hoffnung, 6 C. Rob. 116; Radcliff *v.* Ins. Co., 7 Johns. 38.

A blockade does not preclude a vessel which entered the port before its institution from coming out with a cargo *bona fide* purchased and laden before the blockade began. The Vrow Judith, 1 C. Rob. 150; The Gerasimo, 11 Moore P. C. 88; Olivera *v.* Ins. Co., 3 Wheat. 185; Prize Cases, 2 Black, 635. In the volume of Blatchford's Prize Cases will be found a series of decisions as to what constitutes evidence of intent to run a blockade.

[1] Perels, §§ 48, 51. But the necessity must be imperative. The Diana, 7 Wall. 354.

[2] Naylor *v.* Taylor, 9 B. & C. 718; Sperry *v.* Int. Co., 2 Wash. C. C. 243. The Baigorry, 2 Wall. 474; The Josephine, 3 Wall. 83.

[3] Lorimer's Law of Nations, 145.

"A British ship, The Circassian, was actually seized and confiscated by the American prize courts for attempting to run the blockade at New Orleans, *after* New Orleans had been retaken and was in possession of the north; and she was restored only under the mixed commission appointed by the treaty of Washington at the close of the war. The commission held that as the blockade was terminated by the recapture, the right of a belligerent to exercise the privileges which it conferred against a neutral vessel was at an end." Lorimer's Law of Nations, 145. The point decided in The Circassian, 2 Wall. 135, was that the sailing from a neutral port, with intent to run a blockade, exposes a vessel to condemnation at any place at which she may be seized.

[4] This is fully and ably discussed in Gessner, 12th ed., p. 197.

ı en duly given, the subjects as well as the governments of ı tral states are bound. Notice may be express, ı particular government, or to a ship, or it may be ɜrred from all the facts, among which notoriety o be especially considered.[1] A notice to a foreign rernment is notice to all the subjects of such gov- ıment.[2]—To proceed to the mouth of the blockaded port on ɜ plea of there seeking information, exposes the vessel to ious suspicion;[3] and the mere hovering round a blockaded rt, as if to seize some unguarded point to enter, is ground seizure.[4]

Notice of and intent to run the blockade must be made out.

§ 235. A vessel condemned for breach of blockade, either in- ıtional or actual, is subject to confiscation; and the go is also subject to confiscation unless it should shown that the owners of the cargo were inno- ıt of any intention to break the blockade.[5] The ɜsel, so it has been held, is open to seizure at any time dur- ɜg the return voyage, though she cannot be seized after she aches the home port.[6] But by high authorities[7] it has been

Vessel attempting to run blockade may be confiscated

[1] The Adelaide, 2 C. Rob. 111.

[2] The Neptunus, 2 C. Rob. 110; The awatha, Blatch. Pr. 1.

[3] See The Spes, 5 C. Rob. 72; The ephine, 3 Wall. 83; The Admiral, Wall. 603.

The Charlotte Christine, 6 C. Rob. ; The Gute Erwartung, 6 C. Rob. ; Radcliff *v.* Ins. Co., 7 Johns. 38; Cornelius, 3 Wall. 214.

The treaty between the United States l Great Britain provides that every sel may be turned away from every ckaded or besieged port or place, ich shall have sailed for the same hout knowledge of the blockade or ge; but she shall not be detained, r her cargo, if not contraband, be ıfiscated unless, after notice, she ıll again attempt to enter; but she ıll be permitted to go to any other t or place she may think proper. ı this treaty is conceived to be a ect exposition of the present law of nations upon this point. The intention must be manifested in such manner as to be equivalent to an attempt. Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185.

In the absence of such a treaty, the courts do not require notice; Field's Code Int. Law, § 892, citing 1 Kent Com. 150; The Circassian, 2 Wall. 135; Wheaton on Capture, 193–207; The Hallie Jackson, Blatchford's Prize Cases, 2, 41; The Empress, id. 175; except where the vessel sails without a knowledge of the blockade; The Nayade, 1 Newberry's Adm. Rep. 366.

[5] The Panaghia Rhomba, 12 Moore's P. C. 168; The Neptunus, 3 C. Rob. 173; The Alexander, 4 C. Rob. 93.

[6] Wheaton, Part IV. ch. v.; The Welvaart Van Pillaw, 2 C. Rob. 128; The Yuffrow Maria, 3 C. Rob. 147.

[7] Hautefeuille, iii. 151; Bluntschli, § 836; Gessner, 229; Perels, § 57.

held that the right of blockade is, from the nature of things, to be limited to the vicinity of the place blockaded.

XVI. Rights of Neutrals.

Trade of neutrals to be protected.

§ 238. Not much injury can be done by a belligerent to the trade of the other belligerent with neutrals by land, unless it be by descents on lines of railway carriages passing through the belligerent state. It is otherwise with regard to the high seas. A belligerent, possessed of an active navy, may scour the ocean for prey, and by declaring that enemies' goods may be pursued under any flag, may inflict great injury on neutral commerce. This was the course taken by England during the Napoleonic wars; and it was to meet these supposed aggressions, based as they were on the right of search, and extended so as to include the right to impress British sailors on American ships, that the war of 1812 was declared by the United States.[1] This war was closed without any settlement of this vexed issue; but though the claim to impress has never been subsequently pressed, the position that free ships make free goods has never been admitted by England. Another amendment to the old law has lately been earnestly urged, *i. e.*, that no traps, torpedoes, or sea mines, should be permitted on the open sea.[2]

Neutral territory and waters not to be invaded.

§ 239. It is elsewhere seen that the territory of a neutral state is, by the law of nations, protected from invasion by the forces of another state, unless in case of war.[3] Hence it is a violation of the law of nations to make neutral territory the site of a collision between belligerents, or for one of the belligerents even to cross the boundary of such neutral state for the purpose of pursuing

[1] *Supra*, § 194.

[2] Holtzendorff, *ut supra*, 1249; citing Russell's New Maritime Law, 1856; Macqueen, Law of War and of Neutrality, 1862; Gessner, Les Droits des Neutres, 1876; Bernard, Neutrality of Great Britain during American Civil War, 1871; Hall's Rights and Duties of Neutrals, London, 1874; Louis, Des Devoirs de Neutralité, 1877; Nys, La Guerre Maritime, 1881; Schiattarelli, Il Diritto della Neutralita, 1880; Perels, op. cit., § 39.

When there is a seizure of neutral property in case of necessity, ample redress should subsequently be made. Phillimore, ii. (1882) 7.

[3] *Supra*, §§ 146, 186; *infra*, § 248.

or of evading the forces of the other belligerent.[1] A neutral state, also, is not bound to receive in its waters the ships-of-war of belligerents, though it may grant the privilege, if it grants it to the vessels of both belligerents. In cases of necessity, an asylum should not on any pretence be refused.[2] The mere transit of belligerent ships-of-war through neutral territorial waters is permitted when such waters are the margin of the open seas. But the use of the territorial waters of a neutral state cannot by the law of nations be granted to a belligerent for warlike purposes, or for the purposes of equipment with munitions of war.[3] It is otherwise with regard to repairs and obtaining provisions and coal; though, as we shall see, a neutral cannot open a depot for the permanent supply of coal and provisions to belligerent cruisers. And the stay of belligerent cruisers in a neutral port is usually limited by proclamations of the neutral government to twenty-four hours, unless a longer time be required by stress of weather or by the necessity for repairs. It is settled that a belligerent cruiser cannot be permitted to pursue a ship of the other belligerent into neutral waters, or, *à fortiori*, to engage in direct warfare in such waters.[4] It has been argued that a belligerent cruiser, when pursued, cannot be granted an asylum in a neutral port, except on condition of going out of service during the war, though the preponderance of opinion is against this view.[5] But it is generally agreed that it is not permissible for a belligerent cruiser to pursue a cruiser or merchant vessel of the other belligerent immediately on the latter leaving the neutral port. Before such pursuit is permitted, twenty-four hours should intervene.[6]—Whether a belligerent has a right to complain of an invasion of neutral rights, or whether this right is reserved exclusively to the offended neutral, has been much discussed. There can be no question that the neutral has a right to amends from the offending belligerent. And the better opinion is that the belligerent against whom an unjust advan-

[1] *Supra*, §§ 138, 146; *infra*, § 248.

[2] The Anna, 5 C. Rob. 332. As to territorial waters, see *supra*, §§ 186 *et seq.*

[3] Ibid.; Twee Gebroeders, 3 C. Rob. 162; The Vrow Anna Catharina, 5 C. Rob. 20; 1 Kent's Com. 120.

[4] Calvo, ii. 408; Perels, § 40.

[5] Perels, § 40.

[6] Ibid.

tage is thus taken has a right to redress from a neutral sovereign who permits his neutrality to be thus invaded.[1] It is, however, settled that when neutral waters have been invaded by a belligerent, a party whose property has been seized on such invasion has no right to demand restoration on this ground; the neutral state whose waters have been thus invaded being the proper party to interpose.[2]

Neutrality conditioned by circumstances.

§ 240. The limits of neutrality vary in proportion to the variation of the interests dependent on peace. When all Europe was involved in the Napoleonic wars, the maintenance of the rights of neutrals was mainly dependent on the United States; while the rights of belligerents were pressed to their utmost limits by England and France. In our own civil war, the position was reversed. We were belligerents, and as far as we were concerned, all other civilized nations were neutrals. In the former era, the tendency of all European courts was to depress, in the latter era, the tendency of the same courts was to exalt the rights of neutrals. Another influence, of a less selfish nature

[1] See Lawrence's Wheat., note 217; Dana's Wheat. 208; and note by Holmes to 1 Kent's Com. 117–8.

[2] The Sir William Peel, 5 Wall. 517; The Adela, 6 Wall. 266; and see The Etrusco, 3 C. Rob. 162, note.

In The Anna, 5 C. Rob. 373, 385, Sir W. Scott held that where a vessel, in order to escape visitation and search by a belligerent cruiser, fled to an uninhabited mud island in front of the mouth of the Mississippi, being neutral territory, where she was captured by the cruiser, this was not an invasion of neutral rights.

In this country it has been held that a belligerent cruiser, violating our neutrality laws, can be seized and brought to one of our prize courts for judicial action. The Marianna Flora, 11 Wheat. 2. See, however, case of Cagliari, cited Dana's Wheaton, note, 240; Lawrence's Wheat., note, 84; 1 Holmes's Kent, 122.

The president of the United States is authorized by statute to employ force to compel any vessel which violates our neutrality to leave the coast. U. S. *v.* Kazinski, 2 Sprague, 7.—In The Anne, 3 Wheat. 435, The Sir William Peel, 5 Wall. 517, it was held that the validity of a capture on neutral waters could only be questioned by the neutral state.

"Our courts held" (during the war between France and England),." and they continue to hold, that if the capture be made within the territorial limits of a neutral country into which the prize is brought, or by a privateer which has been illegally equipped in such neutral country, the prize courts of that country not only possess the power, but it is their duty to restore the property to the owner." Mr. Lawrence, North Am. Rev., July, 1878, p. 26.

has lately intervened. It is felt that the policy of international law is to encourage neutrality as *pro tanto* discouraging war; and in order to encourage neutrality it is essential that it should not be subjected to any unnecessary burdens.—The books, it should be added, speak of "imperfect" neutrality, in which a neutral gives contraband support to both belligerents. But such imperfect neutrality only exists as a matter of arrangement between parties.—The duties of a neutral may be said to vary with the conditions of the times in two respects: (1) Engines of destruction, formerly not recognized as contraband, may become contraband when turned to warlike purposes. (2) Neutrality, as the skill with which police restraints can be evaded each year increases, varies as to its duties with the capacity of the neutral state to prevent aid being surreptitiously given to belligerents, and with the increase of facilities by which neutrality can be infringed, even though vigilant watch be kept. Neutrality should not be made so burdensome as to become intolerable.

International and municipal neutrality not convertible.

§ 241. It must be remembered that international neutrality and municipal neutrality are not convertible. A state, for instance, may, from excessive caution, prohibit its subjects from selling to foreigners munitions which might be used to aid such foreigners in a war in which they are engaged; but this will not by itself make such state liable to the belligerent thereby injured for its negligence in permitting its own restrictions in this respect to be transgressed. On the other hand, a state may be very lax in the restrictions it imposes in this relation on its own subjects; but this laxity will not relieve it from liability to other nations whom it may have injured by permitting its subjects to afford to belligerents aid forbidden by the law of nations. In other words, the liability of a nation for a breach of neutrality is gauged not by its own law but by the law of nations. This position was taken by the government of the United States during General Washington's administration, and by the British government in the Alabama controversy.[1] As a matter of fact, the neutrality

[1] See Whart. Crim. Law, 8th ed., § 1901.

statutes, both of Great Britain and of the United States, impose much severer restrictions in this respect on subjects than the law of nations imposes upon sovereigns. The history of legislation and of public opinion in the United States on this topic is of peculiar interest, not only as showing that our legislation imposing neutrality is more stringent than the law of nations; but as marking the extent to which public opinion is swayed to and fro by the varying necessities of epochs. General Washington, in a message of December 3, 1793, said: "The original arming and equipping of vessels in the ports of the United States *by any of the belligerent parties for military service*, offensive or defensive, is deemed unlawful;" and this, in condemning the intrusion of a belligerent on neutral soil for the purpose of fitting out belligerent armaments, is unquestionably a rule of the law of nations. There is nothing in this remarkable message, so often appealed to at home and abroad as giving the true tests of international neutrality, which declares that the fitting out of an armed vessel intended to be delivered to a belligerent in his own port is forbidden by the law of nations. The neutrality act adopted by congress for the purpose, not of defining the law of nations, but of prescribing the duty of citizens to the national government, undoubtedly made it penal to fit out and arm vessels with intent that they should be employed in the belligerent service of a foreign state; but this statute, passed from excessive caution, for the purpose of keeping the new republic, as far as possible, out of the tempestuous war then raging in Europe, was never regarded, as we have seen, as determining the duties of the United States when a neutral to foreign belligerents. It is true that during the late civil war, the state department, in some of its utterances, announced that this and kindred statutes formed the standard of international obligation. It is a matter of regret that this position should have been taken; for, if such were the case, and if these statutes should be regarded as permanently committing the United States to maintain internationally what the statutes ordain for municipal purposes, this would involve not only a repudiation of the liberal doctrines in this relation laid down by the supreme

court of the United States in the *Santissima Trinidad*,[1] but would fasten on us, not as a statutory rule which may be to-morrow repealed, but as a permanent principle of international law, a doctrine which, if carried out exhaustively, would not only cripple some of our most important industries, but would require from us enormous outlay, and an oppressively ubiquitous military home police. But whatever we may say as to the wisdom of the expressions of the state department in this respect, there is no question that judicial as well as political opinion in the United States has swung back again to its old bearings. Our neutrality statutes are again accepted with the interpretation put on them in the *Santissima Trinidad*, the qualification being acknowledged that they prescribe the duty of our citizens to the United States, not that of the United States to foreign governments; and even were this not the case, the ruling in that case, that by the law of nations a neutral is not bound to prevent its subjects from selling armed vessels to a belligerent, has never been judicially modified; and the Federal government has again accepted this view even as determining the scope of our own statutes. We have, as a country, exhaustless mines of iron and coal; and though we may not be able to build steamships as cheaply as they are built in Great Britain, yet the difference is but slight, and there may be many reasons, based in part on patent rights to specific munitions of war, in part on political relations, which might lead a foreign nation to purchase ships in our dock yards rather than in those of Glasgow, or Liverpool, or Belfast. The industry is one of importance; it is one of the prime factors of national power; it enables a powerful nation to stand by herself as against the world, and to protect her ports, no matter what may be the invader's naval strength. Now it so happens that since the civil war we have been constantly supplying with armed ships foreign nations in a state of belligerency either actual or prospective. There has not been a single official intimation that sales of this kind are illegal. Were a prosecution to be ordered against parties

[1] The Santissima Trinidad, 7 Wheat. 283, where it was held that the sale of armed ships or munitions, as articles of commerce, to a belligerent, is not *per se* illegal, though such ships may be exposed to confiscation.

making such sales, there can be no question that the ruling in the *Santissima Trinidad* would be repeated, and the defendants in such cases acquitted. And even were it otherwise, and the sales were to be held illegal by our municipal law, that municipal law would not be held to modify the law of nations, and make our government liable to the offended belligerent for its omission to stop such sales.[1] No doubt to carelessly or knowingly permit an armed cruiser to be manned in a neutral port, and sent out from such port to prey on belligerent commerce, or to form part of a belligerent navy, is a breach of neutrality, just as to permit a land force to be organized for a belligerent on neutral soil is a breach of neutrality. But for a neutral to sell a ship, even an iron clad, to a belligerent, such ship not being manned and armed in the neutral port, is, as will be hereafter seen more fully,[2] no more a breach of neutrality than for a neutral to permit able-bodied men to emigrate to a belligerent state.

§ 242. The policy of the United States is to maintain neutral immunities for the following reasons:—

Policy of the United States is to maintain neutral immunities.

(1) The probabilities of war are far less with us than with the great European states. From the nature of things, points of friction between the United States and foreign nations are comparatively few. We have an ocean between us and the great armed camps of the old world; and, while there are innumerable questions as to which one European state may come into collision with another, the only points as to which we would be likely to come into collision with a European state are those concerned in the maintenance of neutral rights. It was to maintain such rights that we went to war in 1812; and, except during the abnormal and exceptional spasm of the late civil war, our national life has heretofore been the life of a neutral and a vindicator of neutral rights. And neutrality, when our system took shape, was arduous. The world was absorbed in the tremendous contest between France on the one side, and England, with her allies, on the other. At times we were the

[1] That this is the rule in England, see Hall's Int. Law, 537 *et seq.*

[2] *Infra*, § 249.

only civilized power that remained neutral. Threats and blandishments were used both by France and England to drive us from our position, but that position was not only defined and defended, under General Washington's administration, in papers so able and just as to be the basis of all future proclamations of neutrality, but was adhered to, though necessitating a war for its defence. Our international attitude is, from the nature of things, that of neutrality; and of the rights of neutrals we are, from the necessity of the case, the peculiar champions. (2) Although the richest country in the world, our traditions and temper are averse to large naval and military establishments. (3) The idea of pacific settlement of disputed international questions is one of growing power among us; the horror of war has not been diminished by the experience of the civil war; there is no country in the world where love of order is so great, and in which public peace is kept by an army and navy so small; it would be hard to convince the people of the United States that the immense and exhausting armaments of the great European states are not in part caused by the assigning of undue power to belligerents, and that one of the best ways of inducing a gradual lessening of these armaments would be the reduction of these powers. By belligerents, and especially by England when engaged in her great naval wars, have these powers been defined in the interests of war; it is important that the definition should be readjusted by neutrals in the interests of peace. (4) It is impossible to overcome the feeling that the sea, like the air, should be free, and that no power, no matter how great its resources, should be permitted to dominate it so as to enable it, in case of war, to ransack all ships which may be met for the discovery of an enemy's goods. Prizes will become more and more valuable as the wealth traversing the ocean is multiplied; and to sustain belligerent rights in the sense they have been understood by England, is to place in the hands of England, as possessing the most powerful navy in the world, almost unchecked control over this wealth. The position of the United States is that of the power which has more of its produce on the high seas than has any other power, while it has of all great powers the smallest navy; and this position, being that of a nation

which has few points to go to war about, is, from the nature of things, so far as concerns neutral rights, antagonistic to that of nations who, with far less wealth on the high seas, possess navies which would enable them, if this right were conceded to them, to overhaul the commerce on the great ocean lanes of travel. (5) It is not right to offer such a premium to preponderance of naval strength as is offered by the theory of belligerent rights as maintained in Great Britain. To allow a belligerent to search neutral ships, and to take out of them whatever a prize court of such belligerent might consider enemy's goods, gives a virtual supremacy to the power whose superiority in naval force enables it to sweep the seas. If the right to seize an enemy's property in neutral ships is hereafter to be claimed by Great Britain, the right of other nations to obtain naval armaments abroad should be conceded. And to prevent the United States, the only country besides Great Britain in which iron can be manufactured so as to be used for steam cruisers, from supplying other nations, when either at war with Great Britain, or when preparing for such war, with iron to be used in naval warfare, is to make Great Britain tyrant of the seas. Such a claim is as inconsistent with the wise and liberal policy of Great Britain in the present generation as it is with the interests and self-respect of the other great states of the civilized world.

Deviation from this policy during the civil war.

§ 243. It was in part, at least, from the reasons just stated, that prior to the late civil war the United States had been among all maritime powers the most strenuous opponents of the right of unlimited maritime search, and among all great producing states had been the most liberal in the estimate of the aid which might be given by a neutral to a belligerent without infringing the duties of neutrality. The civil war, however, placed us, with very inadequate preparation, in the position of a belligerent, the other belligerent being states seceding from our own Union. In one important respect our attitude was such as to make us peculiarly sensitive to any attempts on the part of France and England to supply the seceding states with aid, and peculiarly desirous to restrict such aid within the narrowest limits. The relations of the United States and England, therefore, were,

as to this important issue, reversed. The United States had been the sturdy and consistent vindicator of neutral rights, and England of the rights of belligerents. As the civil war, however, progressed, the United States, under the pressure of the perils they were called upon suddenly to encounter, found themselves straining belligerent rights to the utmost tension, while England assumed for neutrality prerogatives greater than had been claimed for it previously by the United States. When it was found that in consequence either of the laxity of the British government, or the covert sympathy of some of its subordinate officials with the Confederate movement, privateers fitted out and manned in British ports went forth to destroy the shipping of the United States on the ocean, the United States government was naturally incensed. The claim for damages remained dormant during the war, but with the surrender of the Confederate army it was presented with a gravity which made it necessary for the British government to give it immediate heed. That great loss had been suffered by the owners of American shipping through privateers fitted out in British ports could not be denied; and the only questions to be discussed were: (1) the extent of this damage; and (2) the limits of neutrality as defined by the law of nations, and as applicable to Great Britain during the American civil war.

§ 244. Such were the circumstances which preceded and attended the negotiation of the treaty of Washington of 1871. That treaty, in advance of the arbitration proposed for the settlement of the sums to be paid for damages, laid down the following rules for the guidance of the arbitrators:—

Rules of treaty of Washington limiting neutral rights not of permanent obligation.

"A neutral government is bound: First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations, against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

It will be at once seen that these rules, though leading immediately to an award superficially favorable to the United States in the large damages it gave, placed limitations on the rights of neutrals greater even than those England had endeavored to impose during the Napoleonic wars, and far greater than those which the United States had ever previously been willing to concede. If such limitations are to be strictly applied, the position of a neutral, so it may be well argued, will be much more perilous and more onerous, in case of war between maritime powers, than that of a belligerent. Our government, to fulfil the obligations cast on it by these rules, would be obliged not only to have a strong police at all its ports to prevent contraband articles from going out to a belligerent, but to have a powerful navy to scour the seas to intercept vessels which might elude the home authorities and creep out carrying such contraband aid.[1] Nor would this be all. No foreign war could exist without imposing upon the government of neutral states functions in the repression of sympathy with either belligerent which no free government can exercise without straining its prerogatives to the utmost. It is not strange, therefore, that in view of the hardness of these rules, they should be regarded by European as well as by American publicists as likely to be of only temporary obligation. "When we come to the subject of neutrality," says Professor Lorimer, of Edinburgh, a leading member of the Institute of

[1] It must be recollected that not only our Atlantic and Pacific coasts, but our boundary to the north and to the south contain innumerable points at which belligerents can replenish their contraband stores, and that nothing but a standing army or navy greater than those of any European power could prevent such operations.

ternational Law,[1] "we shall see but too much reason to lieve that even the treaty of Washington of 1871, though ofessing to determine the relation between belligerents and utrals permanently, was in reality a compromise by which utral rights were sacrificed to the extent which, on that casion, was requisite to avoid a fratricidal war. Before the ard of the arbiters who met at Geneva could be applied a precedent, a new treaty, embodying the famous 'Three les,' would require to be negotiated; and it is extremely likely that either England, or any other neutral power, uld again agree, beforehand, *to pay damages for the fulfilment the impossible engagements which these rules impose.*" This ew is strengthened by the fact that the British members of e commission by whom the treaty of Washington was gotiated inserted in the treaty the following memorandum: Her majesty's government cannot assent to the foregoing les as a statement of principles of international law, which ere in force at the time when the claims mentioned in Art. arose; but her majesty's government, in order to evince its sire of strengthening the friendly relations between the two untries and of making satisfactory provision for the future, rees that in deciding the question between the two coun- ies arising out of those claims, the arbitrators should assume at her majesty's government had undertaken to act upon e principles set forth in those rules." It was proposed, in e treaty of 1871, that the "Three Rules" should be sub- itted to the great powers of Europe. It soon became evi- nt that neither Great Britain nor the United States desired make such a submission. "From the correspondence tween the British and United States governments," says r. Wm. Beach Lawrence, who gave the topic great study, d who was a master of international law, "we are to infer at the 'Three Rules' are to be deemed limited in their ope- tion to the single matter of the Alabama claims, and as ithdrawn from any proposed reforms of the law of nations. may be added that there was a conviction on the part of

[1] Institutes of the Laws of Nations, by James Lorimer, LL.D., Blackwood Sons, 1883, p. 52.

both governments that they would not receive the assent of a single state. Austria and Germany had early given instructions to that effect."[1] As also holding that the Three Rules could not be accepted as permanent factors in international law may be cited Mr. Montague Bernard and Sir Travers Twiss, members of the Institute of International Law, meeting at the Hague in 1875, and Sir R. Phillimore, who speaks to the same effect, when discussing the Alabama case in the third volume of his Commentaries. Sir Shenston Baker is equally emphatic: "The better opinion seems to be that oppressive and impracticable obligations would be imposed on neutral nations if the principle set forth as the basis of the award, and the interpretation placed on the Three Rules were acceded to in future cases."[2] Mr. Lawrence, after citing the above authorities, goes on to say: "The condition of belligerency would be infinitely preferable to that of neutrality as defined by the congress of Geneva; and the due diligence prescribed would compel the United States, whenever they were neutral, to maintain a naval police competent to cope with any belligerent forces throughout the whole extent of our coasts, both on the Atlantic and the Pacific." The "Three Rules," therefore, were agreed to by the United States only provisionally, and are not only in conflict with the principles for which the United States contended down to the late civil war, but give advantages to belligerents which even Great Britain regards as excessive. These rules, repudiated as they have been by the contracting powers, and rejected by all other powers, are to be regarded not only as not forming part of the law of nations, but as not binding either Great Britain or the United States.[3]

[1] Note by Mr. W. B. Lawrence, given in 2 Whart. Cr. Law, 8th ed., § 1908.

[2] Note to Halleck, Int. Law, ii. 189.

[3] That the "Three Rules" were temporary and exceptional, and were to be only effective in case of ratification by the great powers, which ratification was never given, is maintained by Mr. Fish in his letters to Sir E. Thornton, of May 8 and Sept. 18, 1876, communicated by Mr. Hayes in his message to the senate, of Jan. 13, 1879. The same position was taken in the house of commons in 1873 by Mr. Gladstone, Sir W. Harcourt, Mr. Disraeli, and the attorney-general. See Am. Law. Rev., vii. 237.

If Great Britain, with her comparatively few ports, failed in her attempts

§ 245. Dismissing from consideration, therefore, the "Three Rules," and the proceedings based on them, we must look to the works of leading publicists and to the decisions of the courts, taken in connection with the present conditions of civilization, to determine what is the law of nations in respect to neutrality. And the first position we have to take is that the furnishing funds by subjects of a neutral state to relieve suffering in a belligerent state is not a breach of neutrality. During the Franco-German war large sums of money were sent from Germans in this country to their friends in Germany, for the relief of sufferers in the hospitals, and large sums were also sent by persons in this country sympathizing with France to the French hospitals; but neither in respect to such contributions, nor in respect to meetings called to express sympathy with the one or the other belligerent, was it maintained that such action constituted a breach of neutrality. The English government has even gone further than this. In 1860, a revolt took place in Naples, which was, if not instigated, at least materially aided by the King of Sardinia. The liberal English press took an active part in encouraging the insurgents; they also received from England

Furnishing of funds by subjects of neutral state to relieve belligerents is not breach of neutrality, and so of loans.

to prevent the use of these ports for the fitting out of Confederate cruisers, we can learn what would be the doom of the United States in case of a European maritime war in which we occupied the position of neutrals. If war, for instance, should exist between Great Britain and any leading continental power, it would be impossible to prevent such power (*e. g.*, Russia, who has very limited capacity of naval armament) from securing contraband aid in our ports. We obtained $15,000,000 under the Geneva arbitration; if the Geneva rules are to hold good, the payment of this comparatively small sum would make us the insurers of any loss British commerce might incur from cruisers whose coaling or whose repair in our ports we could not prevent, unless by the use of expedients subversive of our institutions. The strain put on the British government by the attempts of the Confederate States in our late civil war to fit out cruisers in British ports is well told in Mr. Bulloch's "Secret Service of the Confederate States," N. Y. 1884. In case of a European naval war, we being neutrals, ingenuity in our ports by either belligerent, far less than was displayed by the Confederate agents in British ports during the late civil war, would make it necessary, if the "Three Rules" be applied to us, either to line our shores with a standing army of almost unlimited extent, or to become belligerents ourselves.

important material aid. The French, Prussian, Austrian, and Russian courts joined in a severe censure of the Sardinian king. He was, however, sustained in his course by the English government; and Lord John Russell, in an official letter to Sir J. Hudson, British minister at Turin, declared, as we have seen,[1] "that such assistance could be justified on the same ground that Vattel justified the assistance given by the States General to William of Orange in his invasion of England." This is not a safe precedent, as it would justify interference without limit in the affairs of a foreign state with whom pacific relations were nominally retained, and it is not consistent with the general attitude of England on the question of intervention. But that the subjects of a nation may, without involving the nation in a breach of neutrality, express sympathy with a belligerent in a foreign war, or even contribute funds for the relief of persons engaged in such war, cannot be questioned.[2] It is, however, a breach of neutrality for a neutral nation to permit funds to be raised within its borders for the express purpose of carrying on a foreign war. On the other hand, there is no principle of international law which prohibits a belligerent sovereign from going into the market to borrow money as loans. Such loans were offered by the United States government during the civil war, and were taken up in every European state, without any question as to the propriety of subjects of neutral states making such investments; and the loans offered by England during the Napoleonic campaigns were at least to some extent taken by

[1] *Supra*, § 174, note.

[2] Lord John Russell's letter, as given *supra*, § 174, note, is adopted as text by Sir R. Phillimore, in the 3d volume of his book on international law.

[3] According to President Woolsey (Int. Law, § 162): "International law does not require of the neutral sovereign that he should keep the citizen or subject within the same strict lines of neutrality, which he is bound to draw for himself. The private person, if the laws of his own state or some special treaty does not forbid, can lend money to the enemy of a state at peace with his own country for purposes of war, or can enter into its service as a soldier, without involving the government of his country in guilt. The English courts, however, and our own, deny that any right of action can arise out of such a loan, on the ground that it is contrary to the law of nations. (Phillimore, iii. § 151; case of Kennet *v.* Chambers, 14 Howard, U. S. Rep. 38.)"

subjects of neutral states, and this equally without question of such acts being consistent with international law.[1]

§ 246. The mere act of furnishing by the subjects of a neutral state a belligerent with munitions of war, does not involve such neutral state in a breach of neutrality. (1) Between selling arms to a man, and indictable participation in an illegal act intended to be effected by the vendee through the instrumentality of such arms, there is no causal connection. The miner or manufacturer, to appeal to an analogous case, may regard it not only as possible, but as probable that his staples, when consisting of weapons, or of the materials of weapons, may be used for guilty purposes, but neither miner nor manufacturer becomes thereby penally responsible. (2) To make the vendor of munitions of war punishable would make it necessary to impose like responsibility on the manufacturer; and if on the manufacturer, then on the producer of the raw material which the manufacturer works up. In each case the thing made or sold is one of the necessities of war. In each case the producer or vendor knows that the thing produced or sold will probably be used for warlike purposes. Hence, in times of war, not only would neutral sales of munitions of war become penal, but penal responsibility might be attached to the production of any of the materials from which such weapons are manufactured. (3) Nor would this paralysis be limited to periods of war. A prudent government, long foreseeing a rupture, or preparing in secret to surprise an unprepared foe, might take an unfair advantage of its adversary, were this permitted, by purchasing in advance of the attack all munitions which neutral states might have in the market; but, on the theory before us, a neutral state could not permit this without breach of

Belligerents may be furnished with munitions of war.

[1] See Hall, § 218. It is remarkable that a contrary view should be taken by Bluntschli (§ 768), Calvo (§ 1060), Phillimore (iii. 147), and Kent, *ut supra*. Mr. Hall mentions that during the Franco-German war, the French Morgan loan and part of the North German Confederation loan were issued in England. On the other hand, it has been held that a suit cannot be maintained on a loan made expressly to affect a belligerent object (Kennett *v.* Chambers, 14 How. 38), or to aid in an insurrection in a foreign state against a government at peace with the state of the lender. (De Wütz *v.* Hendricks, 2 Bing. 314.)

neutrality, since to permit such a sale would be to give a peculiarly unfair advantage to the purchasing belligerent. Hence, if such sales are indictable in times of war, they are *à fortiori* indictable in times of peace. Why would a foreign nation, it might well be argued, want in time of peace to buy Armstrong guns, or iron-clads, unless to pounce suddenly down on an unprepared foe? No munitions of war, therefore, could be sold in any country unless to its own subjects, and for its own use; and countries which cannot produce the iron or coal necessary for the manufacture of artillery or iron-clads, would, if no nation can furnish munitions of war to another, have to do without artillery or iron-clads. (4) To establish a national police which could prevent the sale of such staples would impose on neutral states a burden, not only intolerable, but incompatible with constitutional traditions. It might be possible in a land-locked province like Switzerland; it might even be possible in islands of the size of Great Britain; but in a country so vast as the United States, and with an ocean frontier so extended, it would be impossible to establish a police that could preclude such exportation without vesting in the national government powers and patronage inconsistent with republican institutions, and so enormously expensive as to make it more economical to interpose in a war as a belligerent than to watch such war as a neutral. For these and other reasons the United States government has insisted on the right of a neutral to send munitions of war to a belligerent; and this position was taken by President Grant in his proclamation of August 22, 1870. The right was stoutly contested, however, by Germany, while it was maintained by both England and the United States.[1]

[1] See authorities cited in Whart. Crim. Law, 8th ed., § 1903; 1 Kent's Com., 142; Webster's Works, vi. 452. During the Franco-German war large amounts of surplus guns and ammunition were sold by the United States government, and bought by French agents for French use. See Whart. Crim. Law, 8th ed., § 1908, note, p. 636; 11 Alb. L. J., 28.

"It was contended," says Chancellor Kent (I. Com. 142), "on the part of the French nation in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell at home, to a belligerent

§ 247. It is, however, a breach of neutrality for a neutral sovereign to permit within his domains recruiting by one of the belligerents, and any attempt of a belligerent thus to recruit by enlistment of soldiers should be promptly resisted and resented. Enlistments for such purposes are prohibited by statute of June 3, 1794, and April 20, 1818, in this country, and by the statute of July 3, 1819 (59 Geo. III. c. 69), in England.[1] But

Belligerent recruiting in neutral state a breach of neutrality.

purchaser, or carry themselves to the belligerent powers, contraband articles subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. Richardson *v.* Ins. Co., 6 Mass. 113; The Santissima Trinidad, 7 Wheat. 283. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act." In a note it is added: "This passage is cited and approved by Lord Westbury in *ex parte* Chavasse *re* Grazebrook, 34 L. J. N. S. By. 17; see Historicus, Int. Law, 119, 129; Hobbs *v.* Henning, 17 C. B. N. S. 794; The Helen, L. R. 1 Ad. & Ec. 1."

Mr. Jefferson, in his letter to Mr. Hammond, of May 15, 1793, thus speaks: "Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace does not require from them such an internal derangement of their occupations." It makes no matter whether the exportation is large or small. It is as admissible, notwithstanding the high authority of Bluntschli, to export in gross as in small quantities.

As an illustration of the difficulties that would arise in this country from an extension of neutral liability, may be mentioned the fact that in 1882–1883 munitions of war, approximating in value to $5,000,000, were forwarded from San Francisco to China. "The ammunition cases had the brand U. S. government, 45 calibre, and all the cases were from Springfield, Mass." "During that period 240,000 Springfield rifles, and 25,000,000 cartridges in all have been forwarded, besides from 500 to 800 bales of cotton duck suitable for tents, by express by each steamer for China." Philadelphia Inquirer, Aug. 8, 1883. The United States government could not, except by measures which would involve not only enormous expense, but a vast and perilous increase of police force, prevent parties from buying up ammunition at public or private sale, and sending it to China. Yet, if the non-prevention of such exportations imposed liability for the damage thereby produced, the United States would be obliged to pay for all the injury done to English or French property by such ammunition in case of a war between China and France or England.

[1] See U. S. *v.* Hertz, Whart. Prec. § 1123.

this does not make it a criminal offence for the subjects of a neutral state on their own motion to leave home in order to engage in a foreign war, or even to meet together and organize preliminary to volunteering in a foreign service.[1]

So of giving passage to belligerent.

§ 248. A voluntary entrance of belligerent forces, by land or sea, within the territorial limits of a neutral nation, with hostile purpose, except in case of an instant and unavoidable necessity of self-defence, is a violation of neutrality; and such a violation of neutrality may be immediately repelled by the neutral by force.[2] It is further held that where the land forces of a belligerent enter neutral territory, it is the duty of the neutral immediately to disarm them, release their prisoners, and cause them to restore all booty which they may bring with them.[3]

Permitting the fitting out and sailing of cruiser a breach of neutrality.

§ 249. As permitting, by a neutral sovereign, the enlisting within his borders of soldiers to serve in a belligerent army is a breach of neutrality, so, as has been already stated, is it with the fitting out of a cruiser commissioned to serve a belligerent on the seas. Under the neutrality statutes of England and of the United States, it is an indictable offence for individuals to be concerned in the building, arming, or sending out cruisers for this purpose, to be so commissioned and sent out armed from our ports;[4] and it is an offence by the law of nations for

[1] U. S. *v.* Kazinski, 2 Sprague, 7; 4 Op. Atty.-Gen., 336; U. S. *v.* Skinner, 2 Wheel. C. C. 232; Stoughton *v.* Taylor, 2 Paine, 653. In 1856, the United States government, on the ground that Mr. Crampton, the British minister at Washington, and the British consuls at New York, Philadelphia, and Cincinnati, were engaged in enlisting persons in the United States to serve in the British army during the Crimean campaign, sent Mr. Crampton his passport, and revoked the *exequatur* of the three consuls. Annual Register, 1856, p. 277; 34th Cong., 1st Sess., H. R. Ex. Doc. 107.

[2] Field's Int. Code, § 971, citing Halleck, Intern. Law, 517–521; Lushington's Naval Prize Law, p. 62, § 266; According to Lushington, a commander may pass over neutral territorial waters in order to effect a capture beyond, provided they are not waters which cannot be usually passed through without express permission. Naval Prize Law, § 274. *Supra*, §§ 138, 146, 239.

[3] Halleck, Intern. Law, 524; Field's Int. Code, § 972; see *supra*, §§ 138, 146, 179, 239.

[4] U. S. *v.* Quincy, 6 Pet. 445; 3 Op. Atty.-Gen., 738, 741; U. S. *v.* Guinet, 2 Dall. 321. "A neutral country may, without breach of neutrality, permit

a sovereign to permit the issue from his ports of a man-of-war so commissioned, when this might be prevented by the exercise of proper care and diligence. It may be said that between selling, by subjects of a neutral state, of armed ships to a belligerent, which is not forbidden by the law of nations, and fitting out by individuals of a cruiser commissioned and armed to serve such belligerent, which is forbidden, there is no perceptible distinction. But between the sale of ships and of munitions of war, and the fitting out of a cruiser commissioned or to be commissioned for belligerent purposes, there is as real a difference as between permitting individuals, though armed, to emigrate to a belligerent country, and permitting the enlistment of soldiers to serve such belligerent. To prevent the sale of ships or of munitions of war to a belligerent, would, as we have seen, inflict a serious injury on commerce, as well as make countries which do not produce iron and other essentials of iron-clads, and munitions of war, victims of a country by which these staples are produced. But this argument does not apply to the fitting out and manning of cruisers, and permitting a neutral port to be made the basis from which such cruisers go forth commissioned by one belligerent to destroy the shipping of the other belligerent at sea. The imperfect performance by the British government of its duties in this respect, provoked a controversy with the United States, which led to the treaty of Washington, above noticed. It is true that, as we have seen, the rules laid down in the treaty of Washington are not to be regarded as incorporated in international law, or as forming interpretations of that law by which the parties are bound. But while this is the case, the whole procedure must be regarded as ratifying the general principle above stated, that it is a breach of international law for a neutral sovereign to permit the issuing from his ports of cruisers fitted out, commissioned, and manned for belligerent warfare.[1]

both belligerents to equip vessels in its ports. Even without any previous stipulation with either party, the ports of a neutral nation may be closed or kept open to the prizes of both." Mr. Lawrence, North Am. Rev., July, 1878, p. 25.

[1] The question is also discussed by Sir W. Harcourt ("Historicus"), Int. Law, 151; in Bernard on British

§ 250. It is important, as has been already incidentally observed, not to confound freedom in the subject of a neutral

Neutrality, etc., London, 1870; and in Bemis on American Neutrality, Boston, 1866. It was argued with great research in The Alexandra (Attorney-General *v.* Sillem), London, 1863, and in The Meteor, Boston (Little, Brown & Co.), 1869. See Holmes's Kent, i. 124, and 3 Am. Law Rev., 234.

In the Alexandra case (see pamph. rep.) the applicability of the foreign enlistment act to such cases was fully discussed. See notice in Bernard on British Neutrality, etc. The arguments on the motion to discharge the rule are given in Atty.-Gen. *v.* Sillem, 2 Hurl. & C. 431.

"The direct logical conclusions," says Mr. Hall (International Law, Oxford, 1880, § 225), "to be obtained from the ground principles of neutrality, go no further than to prohibit the issue from neutral waters of a vessel provided with a belligerent commission or belonging to a belligerent, and able to inflict damage on his enemy. . . . On the other hand, it is fully recognized that a vessel completely armed, and in every respect fitted the moment it receives its crew to act as a man-of-war, is a proper subject of commerce. There is nothing to prevent its neutral possessor from selling it, and undertaking to deliver it to the belligerent, either in the neutral port or in that of the purchaser, subject to the right of the other belligerent to seize it as contraband if he meets it on the high seas or within his enemy's waters."

"The existing law, according to the summary of it given by Chancellor Kent (Com., i. 128), and adopted by Wheaton (Lawrence's Wheat., p. 729), declares it to be a misdemeanor for any person within the jurisdiction of the United States to augment the force of any armed vessel belonging to one foreign power at war with another power with whom they are at peace; or to hire or enlist troops or seamen for foreign military or naval service, or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with them; and the vessel in this latter case is made subject to forfeiture. The president is also authorized to employ force to compel any foreign vessel to depart, which by the law of nations or treaties ought not to remain within the United States, and to employ generally the public force in enforcing the duties of neutrality prescribed by law. Revised Statutes, §§ 1033 *et seq.*" Note by Mr. Lawrence in Whart. Crim. Law, 8th ed., § 1908.

In the Santissima Trinidad, 7 Wheat. 283, Judge Story, giving the opinion of the court, maintained that the sale of armed ships of war to belligerents by neutrals was never held unlawful in the United States. "There is nothing in our laws," he said, "or in the law of nations, that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale." In the case of the Meteor, libelled in 1866, at New York, Betts, J., says: "As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied is not the extent and character of the preparations, but the intent with which the particular acts are done. The intent is all. Is the intent one to prepare an article of contraband merchandise to be sent to the market of a belligerent, subject to the chances of capture and of the market? On the other hand, is it to fit out a vessel which shall leave our

tate to sell armed vessels to a belligerent, with non-liability
y the vendor to have the ship confiscated as con-
raband if it can be seized by the other belliger-
ent on the high seas.[1] Such ships, in most cases,
elong to the vendees when they put to sea; and
ven if this was not the case, they are open to be
eized on the high seas by the other belligerent as
ontraband of war. In the latter case the risk is one the
endor undertakes to run.[2]

Freedom of sale not to be confounded with relief from liability to confiscation.

§ 251. As is elsewhere stated,[3] it is a moot question how far
t is permissible, by the law of nations, for a neutral
overeign to supply the armed steamers of belliger-
nts with coal. The Geneva award declares: "In
rder to impart to any supplies of coal a character
inconsistent with the second rule, prohibiting the use of neu-
tral ports or waters as a base of naval operations for a belliger-
ent, it is necessary that the said supplies should be connected
with special circumstances of time, of persons, or of places,
which may combine to give them such character." Mr.
Adams, in his opinion, thus speaks: "The supply of coal to
a belligerent involves no responsibility to the neutral when it
is made in response to a demand presented in good faith, with
a single object of satisfying a legitimate want openly assigned.
On the other hand, the same supply does involve a responsi-

Coaling forbidden from a constant base.

port to cruise immediately or ultimately against the commerce of a friendly nation? The latter we are bound to prevent, the former the belligerent must prevent." Mr. Lawrence's note to Whart. Crim. Law, 8th ed., 1908.

For the Alabama case see Encyclopedia Americana, 1883, tit. "Alabama."

For trials during Washington's administration for breaches of neutrality laws, by enlisting in or aiding in fitting out foreign cruisers, see Henfield's Case, Whart. St. Trials, 49; Guinet's Case, ibid. 93; Villato's Case, ibid. 185; Williams's Case, ibid. 652.

[1] See Crawford *v.* Wm. Penn, Pet. C. C. 106.

[2] Story, J., Santissima Trinidad, 7 Wheat. 840; The Bermuda, 3 Wall. 514; The Florida, 4 Ben. 452; and see Dana's Wheat., note, 215.

That the sale of a vessel of war by a belligerent to a neutral in a neutral port cannot hold against the other belligerent, see The Georgia, 1 Low. Dec. 96; U. S. *v.* The Etta, 13 Am. Law Reg. 38; The Peterhoff, 5 Wall. 28.

That a neutral may sell a ship to a belligerent in a neutral port, see The Lilla, 2 Sprague, 177; 2 Cliff. 169.

[3] Whart. Crim. Law, 8th ed., § 1907; *supra*, § 226.

ility if it shall in any way be made to appear that the concession was made either tacitly or by agreement, with a view to promote the execution of a hostile act." Sir Alexander Cockburn, then chief justice of England, as well as one of the arbitrators, defines more specifically the term "base of operations:" "A base of operations signifies a local position which serves as a point of departure and return in military operations, and with which a constant communication can be kept up, and which may be fallen back upon whenever necessary. In naval warfare it would mean something analogous—a port or water from which a fleet or ship of war might watch an enemy, and sally forth to attack him, with the possibility of falling back upon the port or water in question for fresh supplies or shelter, or a renewal of operations."[1] The true distinction is this: It is not a breach of neutrality for a neutral state to permit the coaling of belligerent steamers in its ports to the same extent as it permits the coaling of other foreign steamers resorting to its ports casually, and without accommodations already established for them. Nor is it any more a breach of neutrality for a neutral to sell coal in gross to a belligerent than it would be to sell wheat or cotton.[2] But it is a breach of neutrality for a neutral to permit a permanent depot or magazine to be opened on its shores, on which a belligerent may depend for constant supplies. To require a neutral to shut up its ports so as to exclude from coaling all belligerents would expose a nation with ports so numerous as those of the United States to enormous expense, as well as put arbitrary and pernicious restraints on one of our most important industries. On the other hand, the breaking up of central depots or magazines for the constant supply of particular belligerents would be within the easy range of a national police; and to permit such depots to be established on neutral shores is on principle a breach of neutrality.

[1] This was adopted by Mr. Hardy in the house of commons, March 21, 1873; the President Hayes's Message, Jan. 1879; Cushing's Treaty of Washton, p. 180.

[2] As to importance of coaling depots in modern naval warfare, see article in London Spectator of July 26, 1883. And see *supra*, § 226.

CHAPTER V.

PRIVATE INTERNATIONAL LAW.

I. General Rules.

Private international law part of the common law, § 252.

Penal laws not extra-territorial, § 253.

II. Domicil.

Domicil is a residence acquired as a final abode, § 254.

determines personal *status*, § 255.

Legitimate children take father's domicil and nationality; illegitimate, that of mother, § 256.

Wife takes domicil of husband, § 257.

Student's domicil is his home, § 258.

Domicil of corporation is its principal place of business, § 259.

Domicil is basis of taxation, but not of political rights, § 260.

III. Personal Status.

Aliens entitled to rights of citizens, § 261.

Naturalization now internationally conceded, § 262.

Persons of African descent entitled to equal rights, § 263.

Otherwise as to Chinese, § 264.

Indian tribes not so entitled, but form distinct nationalities, § 265.

Foreign disabilities not extra-territorial, § 266.

Liberty of action subordinate to national policy and good morals, § 267.

Foreign attainder and infamy not extra-territorially effective, § 268.

IV. Marriage.

Marriage not a contract, but an institution, § 271.

In this country, impediments reduced to consanguinity by descent and laterally in one degree, § 272.

Laws requiring consent of parents or of state or church not extra-territorial, § 273.

Divorced parties may be bound not to remarry, § 274.

Law of place of celebration determines mode of celebration, except when subjects of other states are excepted, or the local rites violate conscience or are barbarous, § 275.

V. Divorce.

Foreign divorces viewed with disfavor, § 278.

Domicil of petitioner essential to give jurisdiction, § 279.

Mere residence not sufficient, § 280.

Judicial separation gives wife independent domicil, but not mere voluntary separation, § 281.

Place of marriage and of offence immaterial, § 282.

Extra-territorial service may be adequate, and so of service by publication, § 283.

Record must aver necessary facts, and may be disputed, § 284.

VI. Parental Relations.

Legitimation by subsequent marriage determined by laws of domicil of parent and child, § 288.

As to real estate, territorial policy prevails, § 289.

So as to legitimation generally, § 290.

So as to adoption, § 291.

Parental custody and power determined by local law, § 292.

VII. GUARDIANSHIP.

Domicil of ward determines as to his personalty; foreign guardian must act under local law, § 295.

So of foreign guardian of lunatic and spendthrift, § 296.

VIII. LAW OF THINGS.

Lex rei sitae determines whether a thing is property, § 298.

1*st. Immovables.*

Immovables governed by the *lex rei sitae*, § 299.

Chancellor may compel to convey foreign land, § 300.

Forms of conveyance determined by *lex rei sitae*, § 301.

2*d. Movables.*

Better opinion now is that movables are governed by *lex rei sitae*, § 304.

Rule applies to liens, § 305.

Exception in respect to succession, marriage, and goods *in transitu*, § 306.

Title must be made in conformity with *lex rei sitae*, § 307.

Ships at sea governed by law of flag, § 308.

Debts subject to law of creditor's domicil, § 309.

Prescription, limitation, and escheat are governed by *lex rei sitae*, § 310.

Bankrupt assignments have no extra-territorial effect, § 311.

IX. CONTRACTS.

1*st. General Rules.*

Contracts may be subject to as many jurisdictions as there are parties, § 314.

Question as to seat of contract may be contested by several jurisprudences, § 315.

Lex loci contractus determines interpretation, § 316.

Place of acceptance is place of contract, § 317.

Lex loci actus determines mode of solemnization, § 318.

Law of place of performance determine mode of performance, § 319.

Dates not conclusive as to place, § 32

When laws conflict, that most favorab preferred, § 321.

Lex fori, when peremptory, to obeyed, § 322.

2*d. Maritime Contracts.*

Contract as to ship determined by of flag, § 323.

3*d. Commercial Paper.*

Each party bound by his own § 324.

Law of place of payment controls pa ment, § 325.

Process determined by *lex fori*, § 32

4*th. Insurance.*

Law relating to payment is that place of payment, § 327.

Interpretation depends on usage, § 3

5*th. Partnership.*

Secret partners may set up limitatio of domicil, but not open partne § 329.

6*th. Common Carriers.*

Law of place of performance dete mines mode of performance; law place of payment determines pa ment, § 330.

7*th. Illegal Contracts.*

Illegality determined by law of pla of performance, unless *judex fori* precluded from entertaining sui § 331.

Contracts conflicting with laws of nations or with public policy will not be enforced, § 332.

8th. *Interest.*

Place of performance of contract determines interest, and this may be place of investment, § 333.

9th. *Barring Contracts.*

Federal bankrupt discharges operative in the United States; otherwise as to state insolvent discharges and foreign bankrupt discharges, § 334.

When statutes of limitations are only processual, *lex fori* governs, § 335.

Foreign statutes barring debt not extra-territorial, § 336.

X. Torts.

Lex delicti commissi and *lex fori* must sustain suit, § 337.

XI. Succession, Wills, and Administration.

Immovables governed by *lex rei sitae*, § 338.

Movables by *lex domicilii*, § 339.

Execution and administration have no extra-territorial power, § 340.

XII. Business Forms.

Locus regit actum the general rule, § 342.

XIII. Jurisdiction of Courts and Process.

Local actions to be brought in local courts; otherwise as to transitory actions; process determined by *lex fori*, § 343.

Extra-territorial summons now generally permitted, § 344.

XIV. Evidence.

Letters rogatory issue to obtain testimony in other countries, § 345.

Lex fori determines questions of evidence, § 346.

Admissibility of witnesses and documents so determined, § 347.

Foreign law proved as matter of fact, § 348.

XV. Lis Pendens.

Prior foreign suit no bar, § 349.

XVI. Criminal Jurisdiction.

Country where offence takes effect has jurisdiction, § 350.

Offence may be cognizable in a plurality of jurisdictions, § 351.

Extradition generally limited by treaty, § 352.

Refused when there cannot be a fair trial, and when the object is political, § 353.

State having jurisdiction ought not to surrender, § 354.

Terms should be construed as in asylum state; probable cause enough; evidence for defence admissible, § 355.

Circuit court may review case, and executive may refuse surrender, § 356.

Trial should be restricted to offence specified in demand, § 357.

I. General Rules.

§ 252. We have already seen that public international law is accepted by the common law as part of the law of the land. It is so necessarily with private international law; *i. e.*, that part of the law of nations which concerns the determination of private claims. A suit, for instance, between citizens of France, contracted in France, to be performed in France, concerning property situated in France, must be necessarily determined by French

Private international law part of the common law.

law; and if by any accident it comes before a court in this country, we must resort to French law for its adjudication. We cannot rest this principle on comity. It is applied, not from comity, but from justice. It is applied because the law in subjection to which a contract is made is part of that contract, to be considered as such by every court to which the contract is submitted for adjudication.[1]

Penal law not extra-territorial.

§ 253. There is an important exception, however, to the rule that a case, no matter where it is litigated, is governed by the law to which it is subject. No matter how completely a particular transaction may, from the circumstances of its commission, or from other conditions, be subject to a penal law, such law will not be enforced extra-territorially. No state, in other words, will enforce the penal laws another state has enacted.[2]

II. Domicil.

Domicil is a residence acquired as a final abode.

§ 254. Domicil, in the sense in which the term is used by our courts, is a residence adopted as a final abode. It must be a residence, though if there be an intention to remain finally, it is not necessary that it should be of any particular duration; and domicil may be constituted by a mere inchoate residence, not yet entered upon, when the journey to such residence, which it is intended to make a final abode, has commenced, and the prior domicil is abandoned. But the intention must be that the abode should be final. If it is to be merely a temporary abode, then it does not constitute domicil.[3] The place selected by a person as his permanent home is to be regarded as his

[1] For the authorities prior to 1881 on private international law I must refer to my work on the Conflict of Laws, of which the second edition was published in 1881. To incorporate them in this volume would unduly extend its bulk. I introduce into this work only such references as have arisen since the preparation of the work referred to. See, for the immediate topics of this section, Whart. Conf. of Laws, §§ 1 *et seq.*

[2] Whart. Conf. of Laws, § 4; Woods *v.* Wicks, 7 Lea, Tenn. 40; see *infra*, § 337. As to penal laws generally, see *infra*, § 618.

[3] Whart. Conf. of Laws, § 20. That there cannot be an Anglo-Chinese domicil, see Tootal's Trusts, 23 Ch. D. 532. As to "commercial domicil," see *supra*, § 219.

il as distinguished from his place of business, on the le, and from a mere shifting or occasional residence on her side. And the reason is that as the principal object icil is to determine the law by which a party is bound home relations—*e. g.*, legitimacy, status, marriage, and ution of property after death—it is right that the law ind should be that of the place he selected as his home.[1] rticular length of time is necessary to constitute a il. The new domicil attaches as soon as it is entered ith the intention of permanently remaining. And, as ready been noticed, a party who leaves an old domicil e purpose of taking another, may be said to acquire the domicil as soon as he starts on his journey to it.[2] An micil is presumed to continue until change, and the n of proof of such change is on the party by whom it is . A change of domicil cannot be established unless it wn to have been intended; though the proof of such is necessarily inferential. Men do not often say, tend to change my domicil;" and when they do, declaration will require, to sustain it, proof of extra- facts showing a *bona fide* change, and leading us back, ore, once more, to inferential proof. But when an is selected, as if for a permanency, and settled duties ntered on in such abode, the inference is that a new il has been adopted. And inferences of an intentional e of domicil may be drawn from recitals in deeds and from payment of taxes, and from exercise of political .[3]

Domicil determines personal *status*.

55. According to the prevalent opinion in England and nited States the law of the domicil of a person nines his personal *status*. In Belgium and it is true, nationality has been held by dis- shed jurists to be the test; but there are s difficulties in the way of adopting this test in the l States. In the first place, there are multitudes of per- n our shores who are domiciled in one of our states—*i. e.*,

[1] art. Conf. of Laws, § 69. [2] Ibid. §§ 55 *et seq.* [3] . § 58.

who have accepted an abode in such a state with the intention of permanently remaining—who have not yet become naturalized in the United States. Most of them, it is true, intend in future to be naturalized, and have declared their intention to this effect; but there are others who have no such intention, yet who, as expecting to remain among us permanently, should be subjected to our jurisprudence as far as the determination of their personal *status* is concerned. But a more serious difficulty arises from the fact that in this country, while we have but one nationality, we have as many distinct jurisprudences as we have states. If we want to know, for instance, what are the disabilities attached to a particular woman by force of her coverture, it is not enough to say that the woman in question is a citizen of the United States. This would determine nothing, since each state has in such matters an independent jurisprudence. In such cases the only test is domicil. It may be added, also, that there are many persons who take out, fraudulently it may be, naturalization papers in the United States, with the intention merely of evading some home duty; and who, if nationality be the test, would be enabled successfully to evade such duty, while in no way subjecting themselves to the laws of the country of their naturalization.[1]

Legitimate children take father's domicil and nationality; illegitimate, that of mother.

§ 256. A legitimate child takes its father's domicil and nationality, no matter where the child may be born, nor where the father may be resident at the time of the birth. An illegitimate child, on the other hand, takes the mother's domicil, there being no father recognized as such by the law. As soon, however, as a child is legitimated, it acquires the domicil of the father. The domicil of an infant changes with that of the father, and in case of the father's death, of the mother, supposing that she acts *bona fide* in making the change. A guardian, however, cannot change his ward's domicil, when such a change affects the ward's property, without leave of the proper court.[2]

[1] Whart. Conf. of Laws, §§ 21 *et seq.* abroad of citizens, see De Geer v. Stone, L. R., 22 Ch. D. 243.

[2] Ibid. § 35. As to children born

§ 257. As a rule, the wife's domicil is that of her husband, and when he takes a new domicil the change applies to her as well as to him. To this, however, there are several exceptions. The first is that when a husband deserts his wife, or takes a new domicil with the purpose of separating himself from her, she can sue him for divorce in their old domicil which she retains; and when he drives her from him, so that she is forced to take a new residence, that residence may become her domicil so as to offer a basis for divorce proceedings on her part.[1] The second exception is that community of domicil is severed by legal separation. The third exception is that a change of the husband's domicil produced by compulsion, *e. g.*, where he is banished or imprisoned, does not necessarily change the domicil of the wife.[2]

Wife takes domicil of husband.

§ 258. A student's domicil is not his place of study as distinguished from the permanent home of his family to which he expects to return. He may make such place of study his domicil, however, if he make it his home in which he intends permanently to reside.[3]

Student's domicil is his home.

§ 259. The domicil of a corporation is its principal place of business, if such place is within the state by which its charter is issued. It is not uncommon, however, for legislatures to put heavy penalties on foreign corporations unless they consent to establish an office in the state imposing the law, to agree to accept service in such state of all process against them, and to be bound by the laws of such state so far as concerns contracts made with its citizens within its borders. If so, the corporation, so far as concerns such contracts or business, is virtually domiciled within the state so legislating.[4]

Domicil of corporation is its principal place of business.

§ 260. Domicil does not by itself confer political rights. A man may be domiciled in a state without becoming a citizen

[1] *Infra*, § 279.

[2] Whart. Conf. of Laws, § 43; *infra*, §§ 279 *et seq.*

[3] Whart. Conf. of Laws, § 48.

[4] Ibid. § 48 *a*.

of such state, or acquiring in it any political rights. But domicil is the basis of taxation. All persons domiciled in a state may be personally taxed by it, and they are subject to such personal taxation until they acquire a domicil elsewhere.[1] Hence it has been held that the registered public debt of one state, or of a city or county in such state, may be taxed by another state when held by a domiciled citizen of the latter.[2]

Domicil the basis of taxation, but not of political rights.

III. Personal Status.

§ 261. So far as concerns the right to sue in the courts, the right to personal protection, and the right to hold personal property, an alien belonging to a country not at war with the United States, stands, as a general rule, on the same footing as a citizen of the United States. In some of the states aliens are prohibited from holding real estate beyond a designated limit. There is no such restriction, however, as to the public lands of which the title is in the United States; nor can such restrictions operate when in conflict either with treaty or with the fourteenth amendment giving equal civil rights to all persons. An alien, also, as we have seen, may be domiciled in the United States, though he may have no intention of being domiciled. And aliens have the distinctive privilege of being entitled to sue in the Federal courts.—What has been said, it will be observed, is restricted to civil privileges. Political privileges, so far as concerns the Federal government, are regulated by Federal statutes. So far as concerns the several states, such privileges are determined by state legislation. In some states aliens are entitled, before naturalization, to vote for state and county officers.[4] And in any view an alien cannot set up alienage as a defence to an indictment for a crime.[5]

Aliens in the United States are entitled to equal civil rights with citizens.

[1] Whart. Conf. of Laws, §§ 72 *et seq.* That state may tax generally, see *infra*, § 417 *a*.

[2] Bonaparte *v.* Tax Court, 104 U. S. 592; Aff. S. C. sub nom.; Appeal Tax Court *v.* Patterson, 50 Md. 354.

[3] *Infra*, §§ 363, 588.

[4] Whart. Conf. of Laws, § 17.

[5] *Infra*, § 350; *supra*, § 178.

§ 262. It was for a long time held that the impress of nationality was indelible, and that no act of expatriation, no matter how solemn or permanent, had any international force. This position, however, is now almost universally abandoned. There is no civilized country which does not receive, by naturalization or adoption, persons born in other lands, and does not thereby concede the right of its own subjects to throw off on emigration their allegiance; and now emigration, from the redundancy of population in some of the principal European states, so far from being prohibited, is encouraged. So far as concerns the United States, a naturalized citizen is placed precisely on the same footing as a native citizen, and his rights, unless his naturalization was meant merely to evade home duties, and not with the intention of taking up a domicil in the United States, will be as fully protected against foreign interference as if he were a native citizen. Even an inchoate naturalization, based upon a declaration, under the statute, of an intention to be naturalized, has been held to be entitled, when there is a *bona fide* domicil in the United States, to the same protection.—Naturalization, it should be added, is implied in annexation. When a territory is annexed to the United States, this, by the act of annexation, naturalizes all the inhabitants of such country.[1]

Naturalization now internationally conceded.

§ 263. By amendments to the constitution of the United States, adopted as a part of the reconstruction measures consequent on the close of the war of secession, all political and civil distinctions between persons of African descent and white persons were obliterated, and any state legislation establishing such distinction was prohibited and declared void. These constitutional provisions are elsewhere specifically considered. It is sufficient here to say that while the negro race is hereby entitled to the same rights, civil and political, as the white race, legislation imposing a common restriction in both cases,

Persons of African descent entitled to the same civil and political privileges with whites.

[1] Whart. Conf. of Laws, § 5; *supra*, §§ 154 *et seq.*, 177. Justices' Opinions, 68 Me. 589; see Minor *v.* Happersett, 21 Wall. 162; Crane *v.* Reeder, 25 Mich. 303. As to naturalization in the United States, see *infra*, §§ 431 *et seq.*

e.g., laws prohibiting intermarriage, does not conflict with the constitution as thus amended.[1]

Otherwise as to Chinese.

§ 264. Neither the amendments just specified, nor the naturalization laws adopted by the Federal government, cover Chinese coming to the United States, nor, as a rule, can they become domiciled among us, unless they should intend to remain permanently. This, however, is rarely the case, since they almost without exception retain, when among us, their national dress and their national religion and mode of life, and regulate their mode of living and expenditure so as best to subserve an ultimate return to their native land.[2] By a Federal statute adopted on May 6, 1882, the immigration of Chinese laborers was suspended for ten years with certain limited exceptions.

Indian tribes not so entitled, and constitute a distinct nationality.

§ 265. The Indians resident within the borders of the United States are not within the protection of the amendments to the constitution just noticed.[3] They form, when grouped in tribes, distinct nations, with whom we have from time to time negotiated treaties, and who occupy, in respect to our government both federal and state, a *quasi* independence. They inhabit, when so recognized, distinct reservations of territory, within which they are governed by their own laws. They are not within the range of our naturalization laws; they are not entitled, when thus forming part of a tribe, to vote at elections; they are not punishable in our courts for wrongs committed on or debts due one another. When, however, they leave their reservations, and mingle with the population of a state, they are subject to its laws, though not entitled, by the mere force of the Federal constitution, to vote at its elections.[4] And even when maintaining a distinct tribal system within their own reserva-

[1] *Infra*, §§ 584 *et seq.*

[2] *Infra*, § 435; Whart. Conf. of Laws, § 12. As to naturalization of Chinese, see *infra*, §§ 435, 585; *supra*, § 179.

[3] *Infra*, §§ 434, 585.

[4] That non-tribal Indians may be citizens of a state, see Rogers *v.* Quinney, 51 Wis. 62; and see, generally, Whart. Conf. of Laws, § 9.

As to supremacy of congress, see *supra*, § 26.

That Indians are *quasi* independent, see *supra*, § 26.

That they are not technically citizens, see *infra*, § 434.

That they are not covered by the fourteenth and fifteenth amendments, see *infra*, § 585; *cf.* article in 15 Am. Law Rev., 21.

tions they are subject to the control of the United States government, so far as concerns the dealings of Indians with whites, and so far as concerns the excise laws imposed by congress.[1]

Foreign disabilities not extra-territorial.

§ 266. It is one of the consequences of the old theory of the ubiquity of personal laws that the disabilities and privileges attached to a person by the law of his domicil follow him wherever he goes. This position, however, is not accepted in this country. It would greatly impair business confidence if persons of European descent, settling, as far as may appear, in this country, and here doing business as persons capable of binding themselves by contract, should be entitled to set up, when sued, incapacities or privileges impressed on them by the law of their domicil. When notice is given of a disability, *e. g.*, infancy, or mental incapacity pronounced to be such by home adjudication, then those dealing with a person alleged to be so incapacitated are put on their inquiry. Such notice is implied when a young child, or a person evidently insane, undertakes to do business. But it is otherwise with regard to merely artificial distinctions. These are to be determined by the distinctive policy of the state in which the litigation is pending. If that policy is to assign business capacity to and endow with business responsibility all persons who have arrived at the age of twenty-one, then it would conflict with that policy to enforce foreign statutes incapacitating married women as a class, and extending with men the period of minority five or ten years beyond the limit fixed by the *lex fori*. A state, therefore, which invests married women with greater or less business capacity will regard all married women doing business within its borders as endowed with such capacity; a state which places majority at the age of twenty-one will not regard persons of that age within its borders as infants, though they are still infants by their home law. But the converse that a state adopting a narrow limit of capacity will apply such limit to all foreigners visiting its shores does not follow, the better view being that while restrictions of capacity

[1] *Supra*, § 26; *infra*, §§ 434, 585.

are not extra-territorially binding, it is otherwise with grants of capacity, which are ubiquitous in their effects. As a rule, also, while emancipation by the law of domicil is regarded as everywhere operative, it is otherwise with restrictions or deprivations of freedom, which have no extra-territorial force. In the United States this distinction is of peculiar importance. Our population is made up either of emigrants from the old world, or of descendants of such emigrants. If foreign incapacities as to marriage are held to bind in this country, the shadow of uncertain legitimacy would hang over multitudes; if foreign incapacities of minority were ubiquitous, business would sustain a serious shock in those sections in which it is conducted largely by young men, many of whom come from countries in which they are still minors, they not being as yet naturalized on our shores. Nor could we recognize such restrictions, nor the kindred restrictions placed in some foreign lands on ecclesiastics, and on those judicially assigned to civil death, consistently with the principle imbedded in our own jurisprudence as well as in that of England, that whoever touches our soil becomes free, no matter what may be the extent to which his freedom was restrained in the land from which he came.[1]

Liberty of action subordinate to national policy and good morals.

§ 267. Liberty of action, therefore, when given by the *lex domicilii*, is to be regarded as belonging to the person so privileged wherever he goes. This, however, is subject to important restrictions. It is not permitted to invade, in the first place, settled national policy. Special prerogatives, for instance, given in their own land to particular classes of society, will not be respected in a land whose policy is to recognize no such prerogatives. And, in the second place, neither the privilege of polygamy, nor that of absolute paternal or marital power, will be regarded in the United States as adhering on our shores to persons who by the law of their domicil are entitled to such privileges. This limitation, excepting from ubiquity of what are called personal laws such laws as conflict with the national policy or settled standard of morality

[1] Whart. Conf. of Laws, §§ 101 *et seq.*

of the state where the litigation takes place, is now universally recognized. In harmony with this rule, foreign husbands, parents, and guardians are not permitted to exercise powers not granted to home husbands, parents, and guardians.[1]

Foreign attainder and infamy not extra-territorially effective.

§ 268. Not merely because foreign restrictions on freedom will not be recognized, but because no effect will be given to foreign penal laws, it is now generally agreed that neither a foreign attainder nor a foreign conviction of an infamous offence, will be enforced. Hence the prevalent opinion now is that even in states where a domestic conviction of an infamous offence destroys competency as a witness, no such effect flows from a foreign conviction of this class.[2]

IV. Marriage.

Marriage not a mere contract but an institution.

§ 271. Marriage, as is elsewhere fully shown, is not merely a contract, but is a cardinal international institution of civilization.[3] Without marriage there can be no family, without families no state. So far, therefore, from the state having the power to modify marriage internationally, marriage, as an international institution, transcends the power of the state. Marriage, in this sense, is an exclusive sexual union for life. It must be exclusive; a polygamous union is no marriage. It must be sexual; if either party is impotent, there is no marriage. It must be for life; a sexual union for a term of years not constituting a marriage.[4]

In this country impediments reduced to consanguinity by descent, and laterally in one degree.

§ 272. The policy of this country is to encourage marriage and the growth of families; the policy of the old world is to discourage both. Nor is the restrictive policy of the old world in this respect of recent growth. The poverty of the people, as a body, was at least as great at the time when the canon law was moulded as it is now; and to this poverty, making early marriages generally inexpedient, may be in part traced the restrictions based on consanguinity and

[1] Whart. Conf. of Laws, § 1046.
[2] Ibid. § 108.
[3] Whart. Conf. of Laws, § 126.
[4] Ibid. §§ 126 *et seq.*

affinity with which the canon law abounds. Nor is this the only reason why these restrictions should be regarded as merely temporary and local, and as not consistent with the policy of a country like the United States. They were subject to the dispensing power of the pope, and could thus be withdrawn at his discretion. The authority of the canon law in this respect, therefore, cannot bind us, since that law assumes the intervention of an ecclesiastical arbiter, who is incapable among us of exercising this jurisdiction. Hence the prevalent opinion in the United States is, that mere affinity is no impediment to marriage. Nor is consanguinity, unless lineal, or lateral in the first degree. Hence the only marriages generally prohibited are those between brother and sister, and between persons in the line of lineal descent.[1]

Laws requiring consent of parents or of state or church not extra-territorial.

§ 273. In most European states the consent of parents or guardians, in others the consent of the state, is necessary to the validity of a marriage. As to these laws the following observations are to be made: (1) They bind subjects of such state marrying within its borders. (2) They do not apply, such is the better opinion, to domiciled subjects of other states marrying in the state imposing the restriction. (3) Nor do they apply to domiciled subjects of the restraining state who marry in a country where no such restrictions are imposed. It is true that the last position is denied in France, it being there maintained that a French citizen cannot contract a valid marriage abroad without obtaining the consent of parents or guardians, as prescribed by the French code for French marriages. Restrictions, also, as to capacity and form are imposed by the council of Trent, and by the laws of particular states by which restrictions similar to those of the council of Trent are imposed. On the other hand, the common law brought to this country by its settlers, which in this respect was the canon law as it existed before the council of Trent, made the validity of marriages dependent neither on the consent of parents nor on any particular ecclesiastical

[1] Whart. Conf. of Laws, § 137. On the subject of capacity to marry, see article in American Law Magazine for January, 1883.

approval. These and similar restrictions, therefore, will not be regarded in this country as affecting the validity of marriages solemnized among us, even though the parties are subjects of the state enacting the restriction; and the same may be said of local restrictions on the marriage of persons of different race, or of different religion, or of unequal rank, as well as on the marriage of ecclesiastics. Subjects of such states do not carry with them these restrictions when they travel in foreign lands.[1]

Divorced parties domiciled in a state prohibiting their second marriage bound by such prohibition.

§ 274. When a divorce is granted on terms which prohibit the party divorced from a second marriage, it invalidates any second marriage in the divorcing state by the party so divorced. If such party, however, should become domiciled in a state which regards all divorces as absolute, this would bring with it the right of marrying again. Whether a mere residence without domicil, in a state regarding all divorces as absolute, would validate a marriage in such state by the party so divorced, is a question as to which there is great conflict of authority. The better opinion is that no change of residence not amounting to change of domicil can dispense with the restriction.[2]

Law of place of celebration determines

§ 275. It is generally agreed that the law of the place of celebration determines the mode of celebration; and, consequently, that a celebration lawful by such law is lawful everywhere, while a celebration unlawful

[1] Whart. Conf. of Laws, §§ 147 *et seq.* As to how far the *lex loci contractus* in such matters controls, see *infra*, § 275.

[2] See Whart. Con. of Laws, 2d ed., § 135. The view of the text is not, however, accepted in New York, where a marriage in another state by a party prohibited by the New York law from marrying is held to be governed by the *lex loci contractus*, though such party continued domiciled in New York. Van Voorhis *v.* Brintnall, 86 N. Y. 18.

After a qualified divorce in New York for A.'s (the husband) adultery, he not being entitled by the law of New York to marry again, he went to New Jersey and there married C., a second wife, his first wife still living. In New Jersey, by statute, "all marriages, where either of the parties shall have a former husband or wife living at the time of the marriage, shall be invalid, and the issue thereof shall be illegitimate." A. and C. after their marriage took up their residence in New York. It was held in New York that their marriage was valid. Moore *v.* Hegeman, 92 N. Y. 521.

mode of celebration, except when subjects of other states are excepted, or the local rites violate conscience or are barbarous.

by such law is unlawful everywhere. The following qualifications, however, are to be kept in mind: (1) Such laws, as we have seen, do not, such is the better opinion, apply to the subjects of other states marrying in the state imposing them. (2) They do not apply where one at least of the parties being the subject of a foreign state, could not, without violation of a reasonable conscientious duty, perform the rite in the way prescribed. (3) They do not apply to travellers marrying in barbarous states. (4) They may not apply—though this exception is open to grave doubt—when the parties go to a foreign state and are there married, with the intent to avoid the limitations of the home law.[1]

V. Divorce.

Foreign divorces viewed with disfavor.

§ 278. Marriage being an international institution, essential to the welfare of society, and necessary to the existence of the commonwealth, the policy of the law is to view divorces with disfavor. At one time there were but few Christian countries which recognized the validity of divorces from the bond of matrimony (*a vinculo matrimonii*), though in all such countries divorces from bed and board (*a mensa et thoro*) have been always recognized as valid. Now, however, divorces from the bond of matrimony are granted in almost every jurisdiction in the United States and in Europe for adultery, and for desertion, and for intolerable cruelty. Nevertheless, such is the necessity of maintain-

[1] Whart. Conf. of Laws, §§ 169 *et seq.* For a statement of the different state laws as to marriage, see Mr. Evarts's letter to Mr. Van der Boosche, July 12, 1879, Diplom. Corr. 1879. In Van Voorhis *v.* Brintnoll, 86 N. Y. 18, it was held that the law of the place of celebration was everywhere decisive as to the validity of marriage. See, however, as to limitation, *supra*, § 274; article in American Law Review, March, 1883, 166; Brook *v.* Brook, 9 H. L. Ca. 193; Medway *v.* Needham, 16 Mass. 157; State *v.* Kennedy, 76 N. C. 251, to the effect that the *judex fori* must follow his own law in cases of distinctive local policy. *Cf.* article in London Law Magazine for November, 1882.

That a consensual marriage abroad will be sustained in New York, there being no proof of a conflicting rule in the place of celebration, was held in Hynes *v.* McDermott, 82 N. Y. 41; see Stuckey *v.* Mathes, 24 Hun, 461.

As to Illinois, see Hebblethwaite *v.* Hepworth, 98 Ill. 126.

to. To give jurisdiction over divorce proceedings, it is
ial, according to the prevalent opinion in the
d States, that the petitioner, at least, should
miciled within the jurisdiction of the court.
the husband is the petitioner and is domiciled
n the jurisdiction there is in this respect no difficulty.[2]
nly question is, whether for divorce purposes, the wife
equire a domicil separate from her husband; and this
ion is now settled in most states in the affirmative. If the
domicil, for divorce purposes, is necessarily that of her
nd, then he might add to the injustice of deserting her
justice of domiciling himself in a state in which, from its
ce, or from some peculiarity in its laws, she could have
medy for such desertion. A husband, also, might force
s misconduct his wife to take refuge in another state;
t would be a hard thing if this expulsion from his
il should preclude her from being able to test the ques-
f her further subjection to his will. If divorces are in
ses justifiable, they are justifiable in such cases as these;
o enable them to be decreed in such cases as these, it is
ary that the wife should be entitled, for divorce pur-
to acquire an independent domicil.—It should be added,
n Pennsylvania it is held that to enable a divorce for
ion to be valid, it must be granted in the state in which
rties had their common domicil at the time the deser-
egan.[3]

Domicil of petitioner essential to give jurisdiction.

art. Conf. of Laws, §§ 204 *et seq.*; See generally, Strait *v.* Strait, 3 Mac
llen *v.* Mellen, 10 Abb. N. C. Arth. 415; Loud *v.* Loud, 129 Mass. 14;

§ 280. Although the statutes of some states provide that persons who have been residents for a specified period shall be entitled to sue for divorce, yet "residence" in such statutes should be treated as convertible with "domicil," and no residence should be held to be sufficient, unless there be an intention to remain permanently. But whatever is thought of this position, it is clear that a divorce granted on mere residence, without domicil, will have no extra-territorial effect.[1]

Mere residence not sufficient.

§ 281. A judicial separation—*i. e.*, a divorce from bed and board—gives the wife the right to acquire an independent domicil for divorce as well as for other purposes. It is otherwise as to a separation voluntarily agreed on by the parties, or a separation which the wife exacts without due cause.[2]

Judicial but not merevoluntary separation can give the wife independent domicil.

§ 282. It is immaterial, on this view, so far as concerns jurisdiction, where the marriage was solemnized and where the offence on which the proceedings are based was committed. It is sufficient to give jurisdiction that the petitioner is domiciled in the state to whose court the application is made.[3]

Place of marriage and of offence immaterial.

§ 283. Wherever extra-territorial service is in other cases permitted by the *lex fori*, there is no reason why it should not be good in cases of divorce. By the laws of most states service by publication is sufficient, though such service ought not to be considered sufficient to sustain a divorce in cases where personal notice could be given, but has been withhel

Extra-territorial service may be adequate, and so of service by publication.

[1] Whart. Conf. of Laws, § 228 *et seq.*

[2] Ibid. §§ 225–6.

[3] That this is now the English rule, see Harvey *v.* Farnie, 5 P. D. 153, cited Wh. Conf. of Laws, 2d ed., § 218, and subsequently affirmed by the court of appeals, 43 L. T. R. (N. S.) 737, and by the house of lords, 48 L. T. N. S. 273; and see Hearn *v.* Glanville, 48 L. T. N. S. 356; S. P., Roth *v.* Roth, 104 Ill. 35. In New Jersey, by statute, one of the par must have been an inhabitant at time of the offence. A. B. *v.* C. D., N. J. Eq. 43.

[4] Whart. Conf. of Laws, § 236; as to such service, *infra*, §§ 344, 5 Cook *v.* Cook, 56 Wis. 195. An arti on extra-territorial service in su cases will be found in 26 Alb. Law 447; and see Pettiford *v.* Zoellner, Mich. 358.

§ 284. The record must aver the facts necessary to jurisdiction—*e. g.*, domicil—and such facts may be collaterally disputed. The party disputing the divorce, if domiciled in another state, may show that the averments in the record, either as to domicil or service, be false. But if both parties are domiciled in the jurisdiction, they are both bound by the record, so far as concerns foreign courts. The only remedy for error is then to apply to the courts of the state of their common domicil.[1]

Record must aver facts necessary to jurisdiction and such facts may be collaterally disputed.

VI. Parental Relations.

§ 288. In most continental European states, and in several states in this country, legitimation of children is effected by the marriage of their parents after their birth. By the English common law, as in force in most of our states, no such legitimation is effected. The question, therefore, sometimes arises whether a child so legitimated will be regarded as legitimate in states where the common law in this respect prevails. And the answer given by the English courts is that where the father's domicil, at the time of the child's birth and at the time of the marriage, was in the legitimating state, then the legitimation is to be regarded as extra-territorially effective. But this cannot be so extended as to effect the legitimation of children not domiciled at the time in the legitimating state.[2]

Legitimation by subsequent marriage determined by laws of domicil of parent and child.

§ 289. When the policy of the law is to exclude all children not born in wedlock from the inheritance of real estate, and when this policy is embodied in peremptory statutes, then, to entitle an alleged heir to take by descent, it is necessary that he should be born in wedlock. It will not be enough for him, if legitimate when born, to have been subsequently legitimized by a foreign state.[3]

As to real estate, territorial policy prevails.

[1] Whart. Conf. of Laws, § 230.

[2] Whart. Conf. of Laws, §§ 240 *et* Ibid. § 242. It is now settled in England (Goodman's Trusts, 17 Ch. D. 266; Ct. of App. reversing ruling of Jessel, M. R., in S. C., 43 L. T. N. S. 14, 14 Ch. D. 619) that the law of

So as to legitimation generally.

§ 290. The same rule applies generally to legitimation by legislation or by executive decree. Such legitimation, to be extra-territorially operative, must have emanated, in accordance with the laws of such state, from the sovereign of the state in which were domiciled both parent and child.[1]

So as to adoption.

§ 291. Adoption, though a recognized institution of the Roman law, and sanctioned by the jurisprudence of all states accepting that law, is not regarded by the English common law as establishing in a legal sense a filial relationship between the adopted and the adoptor. An adopted child, therefore, cannot as such, inherit at common law as his father's heir. To give adoption extra-territorial force, it is necessary that it should be perfected in conformity with the laws of the state in which both adopting parent and adopted child are domiciled. And even an adoption so perfected will not be regarded as entitling the adopted child to take real estate as heir in a state which limits the right to take real estate by inheritance to children born in wedlock. When, however, adoption is recognized as part of the system of the state in which the suit is brought, then such state will regard as valid an adoption sanctioned by the laws of a state in which both the adoptor and the adopted were domiciled.[2]

Parental custody and power determined by local

§ 292. Whether a parent is entitled to the custody of a child is to be governed by local law, so far as such custody is a matter of police care. Such, also, is the rule with regard to the father's physical power over the child. Such power must be regulated by the law of the state in which the attempt is made to exercise it; nor will any chastisement be sustained beyond the limits which such law permits. A father's power over the child's movables is, as a rule, determined by the law of their common domicil.[3]

the parents' domicil at marriage and birth determines, as to personal property, the question of the legitimacy under a marriage subsequent to the child's birth.

[1] Ibid. §§ 249 *et seq.*

[2] Whart. Conf. of Laws, § 250.

[3] Ibid. §§ 253 *et seq.*

VII. Guardianship.

295. The *lex domicilii* of a ward, whether infant or luna- determines as to the custody and management of personal property; his real property being gov- ed by the *lex rei sitae*. But a foreign guardian l not be permitted to take possession, even of sonalty belonging to his ward, without the :hority of the local courts, and under such limi- ions as they impose. Nor can a foreign guardian take and force control of his ward, except in subordination to local w. The decrees of the *judex domicilii* in this respect are ly *prima facie* authoritative.[1]

Domicil of ward determines as to his personalty. Foreign guardian must act under local law.

§ 296. To entitle a foreign domiciliary guardian of a lunatic place him in custody, or to take possession of his ods, it is necessary for such guardian to obtain e sanction of the court of the place where the natic may happen to be, or where the goods may situate, as the case may be. Decrees, however, claring a person, not actually deranged, to be in- pable of business as a spendthrift, have no extra- ritorial force.[2]

Foreign guardian of lunatic requires local sanction, but decrees as to spendthrifts not extra-territorial.

VIII. Law of Things.

§ 298. Whether a particular thing, found in a rticular place, is property, and hence whether it ay be owned by a person, is determined by the law such place.[3]

Lex rei sitae determines whether a thing is property.

1*st*. *Immovables.*

§ 299. By both the English common law and the Roman w as held by the several states adopting that law the continent of Europe, immovables are gov- ned by the *lex rei sitae*. Sometimes reasons drawn om the feudal system are given for this rule. But e rule, so far from being distinctively feudal, is one based the necessities of the case. Not merely is land so essential

Immovables governed by the *lex rei sitae*.

[1] Ibid. §§ 259 *et seq*. See Sprague Hoyt, 103 U. S. 613.

[2] Whart. Conf. of Laws, §§ 259–269.

[3] Ibid. § 272.

to the existence of a state that for a state to part with its control of its land would be to part with its sovereignty, but it is by the *lex rei sitae* alone that title to land can be made and can be enforced. The tenure of land, also, is a matter of national policy, and by such policy alone can such questions as those of mortmain, of perpetuity, of homestead exemptions, of squatter privileges, and of tenants' rights, be settled. No other arbiter, also, than the *judex rei sitae* is possible, since it is a *petitio principii* to declare that in such cases the *lex domicilii* of the owner is to prevail, the question at issue being as to who the owner actually is. Hence, in all countries it is now agreed that the *lex rei sitae* governs immovables; and this rule applies to bankrupt and insolvent assignments, and to testamentary dispositions, as well as to dispositions *inter vivos*. Liens in land, therefore, are governed by the *lex rei sitae*, and so is money when representing land. Immovables, it should be remembered, in this sense, include not only land, and the houses and fixtures thereon, but leases and other interest flowing continuously from land.[1]

Chancellor may compel trustee to make conveyance of foreign land.

§ 300. A chancellor, however, may make a decree compelling a trustee, guardian, or executor to convey foreign real estate when this is necessary to a due settlement of accounts, or to other performance of duty by a party duly brought within the jurisdiction of the court.[2]

Forms of conveyance determined by *lex rei sitae*.

§ 301. The forms of conveyance of real estate are necessarily determined by the *lex rei sitae*, and no conveyance is good that is not good according to such law. The same rule applies to registry. When a registry is made essential to the transfer of title, or as notice to other vendees or encumbrancers, then the prescriptions of the *lex rei sitae* must be followed.[3]

[1] Whart. Conf. of Laws, §§ 273, *et seq.*; Hawthorne, *in re*, Graham v. Massey, 48 L. T., N. S. 701. See, also, Fisher v. Parry, 68 Ind. 465; Keegan v. Geraghty, 101 Ill. 26.

[2] Whart. Conf. of Laws, § 288.

[3] Ibid. § 295; see Elwood v. Flannigan, 104 U. S. 562.

2d. *Movables.*

§ 304. Although there is high authority to the effect that movables are governed by the *lex domicilii*, or the law of the owner's domicil, the prevalent opinion now is that they are governed by the *lex rei sitae*, or the law of the place where they are situate. There are several reasons for this rule. (1) As the question generally in litigation hinges upon ownership, the *lex domicilii* of the owner cannot determine, since in such case the question of ownership is what the object of the suit is to try. To assume that either litigant is the owner, so as to get at the *lex domicilii*, is to assume the question at issue. (2) Public policy requires that property so extended and valuable as movables now are (including stock and loans of banks and railroads and other corporations, as well as Federal, state, and municipal securities), should be under the general control of the sovereign by whom such property is protected, and in conformity to whose laws transfers of such property are to be made. (3) Title *in rem* can only be given by proceedings in the place where the thing is situate.[1]

Better opinion now is that movables are governed by *lex rei sitae*.

§ 305. That this rule applies to liens on personalty, is illustrated by recent legislation in respect to chattel mortgages, and the decisions under such legislation. When chattels situate in a particular state are mortgaged, no one any longer questions the exclusive applicability of the *lex rei sitae* to such mortgages. The same rule applies to liens generally. The *lex rei sitae* alone can determine as to the validity and extent of such liens.[2]

Rule applies to liens.

§ 306. The rule before us, however, has several marked exceptions. (1) The distribution of a decedent's personalty is determined, as will be hereafter seen, by the law of his last domicil, subject, however, to such liens and other charges as the *lex rei sitae* may impose, and the same distinctions are applicable to

Exception in respect to succession, marriage, goods in transit, and debts.

[1] Whart. Conf. of Laws, §§ 297 *et seq.*; see Drake *v.* Rice, 130 Mass. 410; State Bank *v.* Plainfield Bank, 34 N. J. Eq. 450; Ames Iron Works *v.* Warren, 78 Ind. 512; First National Bank *v.* Hughes, 10 Mo. Ap. 7.

[2] Whart. Conf. of Laws, §§ 312 *et seq.*

goods passing by marriage settlement. (2) Goods in transit, in lack of any other ascertainable arbiter, are subject to the *lex domicilii* of the vendor, though this must give way to the local law in respect to taxes or other local charges. (3) Debts, as will be hereafter more fully seen, are subject, for many purposes, to the *lex domicilii* of the creditor.[1]

Title must be made in conformity with *lex situs*.

§ 307. It follows that title can only be made in such way as to shut out adverse claimants by following the provisions of the *lex rei sitae*. This has been frequently ruled to be the case with regard to extra-territorial assignments. The fact that the owner is domiciled in another state in which the assignment would be good, does not make the assignment good unless it be in conformity with the law of the place where the thing assigned is situate. The only plausible exception proposed to this rule exists where all the parties litigating an assignment are domiciled in a state in which such assignment is good. In such case the parties may be held bound by the law of their common domicil.[2]

Ships at sea governed by law of their flag.

§ 308. As we have already seen,[3] a ship at sea is, by the prevalent opinion, a part of the territory of the state whose flag she bears, and is consequently governed by the law of such state. As between the several states in the American Union, a ship is governed by the law of the state in which she is registered. A ship in port, however, is governed by port law, though this does not apply to foreign vessels of war.[4]

Debts subject to law of creditor's domicil.

§ 309. So far as concerns taxation and assignability, debts, viewed separately from any security which may be given to insure their payment, are governed by the law of the creditor's domicil. Where, however, the debt is attached by a third party prior to an assign-

[1] Ibid. § 311; *infra*, § 309. That a non-resident creditor of a city cannot be said, in virtue of a debt due by the city, to hold property within its limits, see Murray *v.* Charleston, 96 U. S. 432.

[2] Whart. Conf. of Laws, §§ 334 *et seq.*

[3] *Supra*, § 188.

[4] Whart. Conf. of Laws, § 356. *Supra*, § 188. The law of the flag determines master's right to find owner. Maclachlan, Mer. Ship, 3d ed., 64–5. That it obtains in questions of bottomry, see The Gaetano, 46 L. T. N. S. 835. As to territorial waters, see *supra*, §§ 186 *et seq.*

nent of it by the creditor, the attachment will be ordinarily held by the *judex fori* to exclude the assignment in all cases where the attachment is good by the *lex fori*. A *judex fori*, also, will not sustain a foreign assignment, though good by the law of the creditor's domicil, when bad by the law of the forum. Nor does the fact that debts in the sense above stated are subject to the law of the creditor's domicil withdraw any property given to secure such debts from the operation of the *lex rei sitae*. At the same time, when all parties litigating questions of this class belong to a common domicil, the law of such domicil may be held to govern them in respect to such assignment.[1]

Prescription, limitation, confiscation, and escheat, governed by *lex rei sitae*.

§ 310. From the nature of things, prescription and limitation must be determined by the law of the place in which is situated the thing in litigation. When title by prescription or limitation is good by such law, it is good everywhere. The same may be said with regard to title acquired by confiscation and escheat.[2]

Bankrupt assignments not extra-territorial in their effects.

§ 311. The better opinion now is that bankrupt process is in the nature of a general execution against all the bankrupt's estate. When the bankrupt assignee obtains possession, and moves the property into the jurisdiction of the court, then his title is ordinarily to be regarded as everywhere good. But he can no more seize by force of his office the bankrupt's goods in a foreign state, than could a sheriff's officer levy an execution in a foreign state. To sustain a claim in either case, the action of the *judex rei sitae* is necessary.[3]

IX. Contracts.

1*st. General Rules.*

Contracts may be sub-

§ 314. Where the several parties to a contract belong to separate countries and are subjected to distinct jurisprudences, there may be at least as many systems of juris-

[1] Whart. Conf. of Laws, § 359 *et seq.*
[2] Ibid. §§ 378 *et seq.*; Keyser *v.* Rice, 7 Md. 203.
[3] Whart. Conf. of Laws, §§ 387 *et seq.*

Subject to as many jurisdictions as there are parties.

prudence bearing on the contract as there are parties. A letter of credit, for instance, issued by a banker, may be addressed to correspondents in every part of the civilized world, and when any one of these correspondents is applied to for funds, this subjects the holder of the letter, at least so far as concerns mode of payment, to the law of the domicil of the party so applied to. As there is no contract which does not have to it at least two parties, there is, therefore, no contract which may not have to it at least two applicatory laws. This may be illustrated by policies of insurance, in which, as we shall see, the liability as to the premium is gauged by the law of the domicil of the insured, while liability for the loss is gauged by the law of the domicil of the insurer.[1]

§ 315. But this is not all. As to each party there may be several conflicting jurisprudences. What is called the seat of a contract may vary, as we consider the parties thereto in varying relations. Thus, the liability of each party may be determined by any one of the following systems of law:—

Question as to seat of contract may be contested by several jurisprudences.

(1) *Lex loci contractus*, or place where the liability was assumed.

(2) *Lex loci actus*, or place of solemnization.

(3) *Lex loci solutionis*, or place where the contract is to be performed.

(4) *Lex fori*, or place where the trial takes place.

And it may be generally said that the *lex loci contractus* determines the meaning of the words used; the *lex loci actus*, the mode of solemnization; the *lex loci solutionis*, the mode in which the contract is to be performed; and the *lex fori*, the way in which process on the contract is to be conducted.[2]

§ 316. The reason why the *lex loci contractus* determines interpretation is that the parties framing a contract in a particular place are supposed to have the law of that place in view in the consideration of the words they use. If it appear that they did not have such law

Lex loci contractus determines interpretation.

[1] *Infra*, § 327. and Whart. on Cont., §§ 393 *et seq.* As the parties with distinct domicils increase, so proportionally extend the applicatory laws.

[2] Whart. Conf. of Laws, §§ 394 *et seq.*; see Edgerly v. Bush, 81 N. Y. 199; Banchor v. Gregory, 9 Mo. Ap. 102.

in view (*e. g.*, where two Englishmen, happening to meet in New York, make a contract in New York to be performed in England, using words which in England have acquired a definite meaning which the parties have in mind), then the reason ceasing, the conclusion no longer holds good. The rule, then, is not one of arbitrary law, but of logic varying with the circumstances of the case. The question, as far as concerns interpretation, is, what is the law which the parties intended to incorporate in the contract.[1]

Place of acceptance is place of contract.

§ 317. In a technical sense, the place where a contract is accepted is the place of the contract. A contract is not regarded as completed until a proposal made by one party is accepted by the other, the time and place of the acceptance being therefore the time and the place of the contract. Yet the place of acceptance only affects interpretation so far as concerns words distinctively used in the acceptance. Hence, it is a general rule of interpretation that when a word with a distinctive local meaning is introduced into a correspondence, it is to be ordinarily interpreted in the sense in which it was used by the party by whom it was introduced.[2]

Lex loci actus determines mode of solemnization.

§ 318. There are some kinds of solemnization, *e. g.*, those relating to conveyances of real estate, and to transfers of stocks and other securities, as to which the local law prescribes certain forms, which must follow the prescriptions of *lex rei sitae*. Where, however, there are no rules imposed, then the forms prescribed by the law of the place of solemnization are to be followed, as they are often the only forms that can be observed.[3]

§ 319. When parties agree that a contract is to be performed in a particular place, it is natural that they should have the

[1] Whart. Conf. of Laws, §§ 401 *et seq.*; see Pritchard *v.* Norton, Sup. Ct. U. S. 1883; Bell *v.* Packard, 69 Me. 105.

[2] Whart. Conf. of Laws, §§ 399 *et seq.*; see Shattuck *v.* Ins. Co., 4 Cliff. 598; Oregon Co. *v.* Rathbun, 5 Sawy. 32; Hunt *v.* Jones, 12 R. I. 265; Dickinson *v.* Edwards, 58 How. (N.Y.), 24; Mills *v.* Wilson, 88 Penn. St. 118; Cromwell *v.* Ins. Co., 49 Md. 366; Cubbedge *v.* Napier, 62 Ala. 518.

[3] Whart. Conf. of Laws, §§ 401 *et seq.*; see Scott *v.* Duffy, 14 Penn. St. 18.

law of that place in view when they prescribe the mode of performance. Hence flows the rule that the law of the place of performance determines the mode of performance. Undoubtedly this rule applies in all cases where the parties must be inferred to have had the place of performance in view when they framed the contract. A contract, for instance, to do a thing which is lawful in B., the place of performance, but is not lawful in A., the place of contract, will be construed according to the law of B.; for the parties will not be presumed to have intended an illegal act. But this rule, also, is one of logic and not of arbitrary law. It may happen that the parties intended the mode of performance to be according to the law of the place of contract, and not to the law of the place of performance. Two Frenchmen agree, for instance, to deliver in New York a number of pieces of silk, and it appears that with regard to the amount of silk to make up such pieces they had in view the measurement usual in France, not that usual in New York. In such case the French measurement, not the New York measurement, would be that by which the contract is to be determined. But, unless in such exceptional cases as these, the law of the place of performance determines the mode of performance. This is eminently so with respect to payment, which, as to mode, is governed by the law of the place of payment.[1]

Law of place of performance determines mode of performance.

§ 320. Dates are often inserted arbitrarily, sometimes a printed form being followed, sometimes the residence of one of the parties, the others looking upon date as a mere matter of form. It is, therefore, always admissible to prove the actual as distinguished from the formal date, and the parties are in no way concluded by the date given in the document.[2]

Dates not conclusive as to place.

[1] Whart. Conf. of Laws, §§ 401 *et seq.*; Northwest Ins. Co. v. Elliott, 7 Sawyer, 17; see, further, Hill v. Spear, 50 N. H. 253; Graham v. Bank, 84 N. Y. 393; Webber v. Donelly, 33 Mich. 469; Rindskopf v. De Ruyter, 39 Mich. 1; Champion v. Wilson, 64 Ga. 184.

[2] Whart. Conf. of Laws, § 411; Whart. on Ev., § 977.

§ 321. When it is a matter of doubt which of two conflicting laws the parties intended the contract to be subject to, it is a general rule that if by one of these laws the contract would be invalid, while by the other it would be operative, the contract will be presumed to have been made in view of the latter law.[1]

When laws conflict, that most favorable to contract preferred.

§ 322. When, however, the *lex fori* peremptorily prohibits suits on particular kinds of contracts, *e. g.*, gaming contracts, the prohibition is absolute, and must, as will be seen, be enforced by the *judex fori*.[2] In all other cases, the law to which the contract is actually subject is to be enforced as a matter of right.[3]

Lex fori when peremptory to be obeyed.

2*d. Maritime Contracts.*

§ 323. As a general rule, following from the position that a ship is a floating section of the country to which she belongs, contracts relating to a ship as such are governed by the law of such country. When the ship enters a foreign port, however, she is bound by the law of the port, and is subject to such liens and charges as that law may impose. As to the performance of freight contracts, the law of the place of performance usually prevails. As to general average, the *lex Rhodia jactu* is the usual standard.[4]

Contracts as to ship determined by law of flag.

3*d. Commercial Paper.*

§ 324. Each party to commercial paper is in a certain sense bound by his own law. If the question concerns the mode and conditions of signature, then the law in the place where he signed usually prevails; if the question concerns the mode and conditions of payment, then the law in the place of payment usually prevails.

Each party bound by his own law.

[1] Whart. Conf. of Laws, § 429; *infra*, §§ 333, 615; see Fitch *v.* Remer, 1 Flip. C. C. 15.

[2] *Infra*, § 331.

[3] Whart. Conf. of Laws, § 428; see Denny *v.* Faulkner, 22 Kan. 89; Banchor *v.* Gregory, 9 Mo. Ap. 102.

[4] Whart. Conf. of Laws, §§ 440 *et seq.*; *supra*, § 188.

Hence there may be as many distinct jurisprudences bearing on commercial paper as there are signatures to such paper.[1]

Law of place of payment controls as to payment.

§ 325. The mode of payment, and general liability in respect to payment, are settled by the law of the place of payment, which controls, also, the allowance of days of grace, the amount of interest to be collected, and the mode of demand and protest. The form of protest is governed by the law of the place of payment, unless, as can only be the case in very rare contingencies, the protest is necessarily made in some other place. When, however, an endorser is fixed, by protest and notice, as immediate debtor, the notice he is to give to the party from whom he took depends upon the law governing the contract between him and that party. The liability, also, of drawer and endorser is conditioned by that of the acceptor, but is subject, as to payment, to the special place of payment. From the general principles above stated, it follows that a bill formally defective in the place where it was made may bind endorsers if good in the place of endorsement, which, as to such endorsers, is the place of payment. Intermediate endorsements, also, though defective by the *lex loci actus*, do not preclude further negotiability when valid by the law of the place to which the maker or acceptor is subject.[2]

Process determined by *lex fori*.

§ 326. Process on negotiable paper, together with the costs and interest to be recovered thereon, are determined by the *lex fori*.[3]

4th. Insurance.

Law relating to payment is that of place of payment.

§ 327. Contracts of insurance are governed by the same principles as those already noticed as bearing on contracts in general. The law of the place where the loss is to be paid, being generally the principal office of the insurer, determines the mode and conditions of payment by the insurer; the law of the place where the premium is to be paid, being generally the domicil of the

[1] *Supra*, § 314; Whart. Conf. of Laws, §§ 447 *et seq.*; and see Royal Bank *v.* Commercial Bank, 47 L. T. N. S. 360.

[2] Whart. Conf. of Laws, §§ 402, 450; see Guy *v.* Rainey, 71 W. 221; Hart *v.* Wills, 52 Iowa, 56.

[3] Whart. Conf. of Laws, § 462.

insured, determines the mode and conditions of payment by the insured. When, however, an insurance company establishes in a particular state an agency with power to act, then such agency is invested with the liabilities attaching to a principal office, and in some states these liabilities are imposed by statute on all agencies of foreign insurance companies, nor is any foreign insurance company permitted to act in such states except through a responsible agency subjected to such liabilities.[1]

Interpretation dependent on usage.

§ 328. The interpretation of contracts of insurance is governed by the same rules which bear on contracts generally. If such contracts are made in the common domicil of both parties they are governed by the laws of such domicil in matters of interpretation. If there are conflicting laws, then an ambiguous term will be supposed to have been used in the sense in which it was intended by the party introducing it, such sense being generally that in which it is used in his place of business.[2]

5th. Partnership.

Secret partner may set up limitations of his domicil, but not partner appearing as such.

§ 329. If the object of a suit be to charge a particular party as secret partner in a firm, such partnership not being known to the plaintiff at the time of the contract on which he sues, it has been held that the alleged secret partner may avail himself of the limitations of liability in such cases imposed by the law of his domicil. It is otherwise, however, when his membership as one of the firm was known to the plaintiff at the time of the contract, while no notice was given of any limitations of his liability.[3]

6th. Common Carriers.

Law of place of perform-

§ 330. So far as concerns the mode of performing a contract of common carriage, the law of the place of performance determines in all matters left open by the contract. It has been held, however, that the inter-

[1] Ibid. § 465; see Maspons *v.* Mildred, 47 L. T. N. S. 318; Shattuck *v.* Ins. Co., 4 Cliff. 598.

[2] Whart. Conf. of Laws, §§ 466–7.

[3] Whart. Conf. of Laws, §§ 468 *et seq.*

ance determines mode of performance; law of place of payment determines payment.

pretation of such a contract is determined by the law of the place of the carrier's principal office, and this undoubtedly holds good where the words to be interpreted emanate originally from such office. By the law of the place of such principal office, also, is the question of the carrier's limitation for liability for negligence usually determined, that being the place where such limitation is generally imposed and accepted.[1]

7th. *Illegal Contracts.*

Illegality determined by law of place of performance, unless *judex fori* be precluded from entertaining suit.

§ 331. There are cases in which the *lex fori* peremptorily forbids suits of a particular character from being brought. When this is the case, no recovery can be had on such a suit, although the contract may not be illegal by the law of the place of performance. If there be no such prohibition, however, the law of the place of performance is to determine as to the legality of the contract. This distinction applies to contracts to sell spirituous liquors, to gaming contracts, to contracts for the carrying on of lotteries. On the other hand, contracts, one of whose objects is to evade a foreign revenue law, will not for this reason be held illegal by the *lex fori*. The distinction is, that while a contract to do a thing legal in the place of performance will be enforced, unless the suit be peremptorily forbidden by the *lex fori*, the *judex fori* will not enforce a foreign penal law by declaring invalid a contract which in its performance would conflict with that law.[2]

Contracts conflicting with law of nations or public policy will

§ 332. A contract conflicting with the law of nations—*e. g.*, to commit a breach of neutrality—will not be enforced; nor will a contract conflicting with public policy. Hence contracts in restraint of

[1] Ibid. §§ 471 *et seq.*

[2] Whart. Conf. of Laws, §§ 487–490 *et seq.*; see Second Nat. Bank *v.* Curren, 36 Iowa, 555. As to illegal contracts generally, see Whart. on Cont., §§ 335 *et seq.* That a court will enjoin a domiciled citizen from prosecuting in a foreign state an inequitable claim against another domiciled citizen of the home state, see Dehon *v.* Foster, 4 Allen, 545; Vail *v.* Knapp, 49 Barb. 299; Snook *v.* Snetzer, 25 Oh. St. 517; Engle *v.* Scheuerman, 40 Ga. 206; Keyser *v.* Rice, 47 Md. 203; Story, Eq., § 899.

trade, gaming contracts, and contracts with public enemies have been held invalid.[1] not be enforced.

8th. *Interest.*

§ 333. The law of the place where a contract is to be performed generally determines what interest is to be paid on it, subject to the following limitations: (1) Interest peremptorily forbidden by the *lex fori* as usurious cannot be recovered. (2) While, with negotiable paper, the place of payment may be regarded as the place of performance, there are many instances in which the place of investment is to be so viewed in this relation. Where money, for instance, is invested in a mortgage or other security at high interest in a newly settled state, then the place in which the payment is to be enforced as against such security, is such state; and this would make the applicatory law that of the place of investment, which would enable the interest to be governed by the law of the place where the risk is incurred, not by the law of the place where the contract happened to be executed. Because the parties accidentally framed the contract in a state where the interest agreed on was usurious, or because the parties happened to be domiciled in such state, it would be unjust to pronounce a contract usurious when the interest received was only in proportion to the risk, and when such interest was lawful in the place of investment. With this coincides the rule that when, in cases of doubt, there are two conflicting laws bearing on a contract—one sustaining it, the other avoiding it—the parties may be supposed to have had in mind the law by which it would have been sustained.[2] Place of performance of contract determines interest, and this may be place of investment.

9th. *Barring Contracts.*

§ 334. A discharge of a debtor under a Federal bankrupt statute binds throughout the United States. A state insolvent discharge, however, only binds parties domiciled in the discharging state, and Federal bankrupt discharges

[1] Whart. Conf. of Laws, § 495; Whart. on Cont., §§ 835 *et seq.*

[2] *Supra*, § 321; Whart. Conf. of Laws, §§ 501 *et seq.*

operative in the U. S., otherwise as to state insolvent discharges, and foreign bankrupt discharges.

creditors who may validate the insolvent assignment by electing to take under it or otherwise. And the better opinion is that foreign bankrupt discharges, in view of the fact that in most cases bankrupt process is used for the purposes of local execution, and is not based on any fixed international rule, have no extra-territorial effect on parties not domiciled in the discharging state.[1]

When statutes of limitation are only processual, *lex fori* governs.

§ 335. Statutes of limitation are of two kinds, those which merely regulate and restrict the right of suing, and those which extinguish the debt. The first are determined by the *lex fori*. When the *lex fori* says that the suit cannot be maintained, then it cannot be maintained notwithstanding it is in force by the *lex loci contractus;* if the *lex fori* says that the suit can be maintained, then it is no defence that it is outlawed by the *lex loci contractus*. But if the law to which both parties are subject absolutely extinguishes the debt, then it cannot be revived by a suit brought on it in a foreign land.[2]

Foreign statute extinguishing debt not extra-territorial.

§ 336. For the reasons above given, a foreign statute extinguishing a debt has no extra-territorial force except so far as concerns domiciled subjects of the state by which the statute is imposed.[3]

X. Torts.

Lex delicti commissi and *lex fori* must sustain suit.

§ 337. An act which is not a tort by the law of the place of commission, cannot usually be sued on as a tort in another country, though it would have been a tort by the law of such country had it been there committed. It is otherwise when the tort consists in negligence in the imperfect performance of a contractual duty. In such cases the question of liability is determined, so far as concerns interpretation, by the law of the place in which the contract was framed; so far as concerns payment, by the law of the place of payment. But when a tort is sued

[1] See Whart. Conf. of Laws, § 531; Bedell *v.* Scruton, 54 Vt. 493.

[2] Whart. Conf. of Laws, § 534.

[3] Ibid. § 538; McDougall *v.* Carpenter, 55 Vt.

for especially as such, then to sustain the suit the act complained of must be a tort both by the *lex delicti commissi* and the *lex fori*.[1] Injuries to real estate, however, can only be redressed in the state where the estate is situate.

XI. Succession, Wills, and Administration.

Immovables governed by *lex rei sitae*.

§ 338. Immovables, according to the prevalent rule, accepted not only in England and the United States, but in most of the states of continental Europe, are governed, even when belonging to a decedent's estate, by the *lex rei sitae*. By that law alone can the inheritance of immovables be determined; by that law alone can it be decided whether such property is subject to the decedent's debts. There is this important difference, however, between the Roman common law and our own, that by the former leasehold estates are immovables, by the latter they are personal estate.[2]

Movables governed by the *lex domicilii*.

§ 339. It is now everywhere conceded, on the other hand, that movables are governed by the law of the decedent's last domicil. The only exceptions to this rule are those prescribed by local legislation, as where by such legislation it is provided that there shall be an exemption from the estate of all persons dying in the state (whether domiciled or not) in favor of widow or children. The rule, also, is subject to the prior claims of local taxes. The law of the last domicil, also, determines as to the succession of movables; the *lex rei sitae* governing the succession of immovables. Wills, unless otherwise provided by statute, must be solemnized, so far as concerns personalty, by the law of the

[1] Whart. Conf. of Laws, §§ 474 *et seq.* Since the publication of the second edition of my book on the Conflict of Laws, it has been held by the supreme court of the United States that a suit by the personal representatives of a person killed when sustainable in the state of the killing, may be sustained in any U. S. circuit court having jurisdiction of the parties. Dennick *v.* R. R., 103 U. S. 11. In New York it has been held that such a suit will be maintained when the statute of the place of the injury coincides generally, though not in detail, with that of the *forum*. Leonard *v.* Nav. Co., 84 N. Y. 48. See, however, Hyde *v.* Wabash R. R., Sup. Ct. Iowa, 1883; Taylor *v.* Penns. Co., 78 Ky. 348.

[2] Whart. on Conf. of Laws, §§ 548 *et seq.* See Orr Ewing, *in re*, 21 Ch. D. 456; 48 L. T. N. S. 555.

last domicil. The execution of a power, however, must be in conformity with the law of the place where the trust is created and the property is situated.[1]

Executors and administrators have no extra-territorial power.

§ 340. An executor or administrator has no power out of the state by which his letters are granted. When, however, he is duly authorized to act by the law of the place of the decedent's last domicil, he is usually permitted to take out local letters, on duly giving security, by the courts of the state in which there is any property of the deceased to be administered.[2] Without receiving such authority, however, a foreign administrator cannot sue, nor, unless he receives such local *status*, can he be sued. An ancillary administrator, such is the better opinion, is entitled first to settle with creditors in his own jurisdiction, and then remit the proceeds to the principal administrator. The *lex fori* in each case decides as to priority. Taxes on succession are determined by the law of the decedent's last domicil.[3]

XII. Business Forms.

Locus regit actum the general rule.

§ 342. *Locus regit actum* is the rule generally applicable to all matters of business form; in other words, the law of a place where a formal act is to be done, determines the form to be observed. This rule is applicable to protests of commercial paper and to notarial certificates in general. But it does not apply when the *lex rei sitae* prescribes certain forms of conveyance of acknowledgment and of registry as essential. Therefore, the fact that a contract was solemnized in a foreign country does not in this country withdraw the case from the statute of frauds, nor avoid the necessity of stamps when made essential, nor relieve the parties from the duty of duly acknowledging

[1] Whart. on Conf. of Laws, § 561.

That the law of the testator's domicil determines the law of charitable devise, see Jones *v.* Habersham, 107, U. S. 174; Crum *v.* Bliss, 47 Conn. 592; Blancan, *in re*, 4 Redf. (N. Y.) 151; Caulfield *v.* Sullivan, 85 N. Y. 153; Russell *v.* Madden, 95 Ill. 485; Speed *v.* Kelly, 59 Miss. 47.

[2] See Wilkins *v.* Elliott, Supreme Ct. U. S., 1883.

[3] Whart. Conf. of Laws, §§ 604 *et seq.* See generally, Barry's App., 88 Penna. St. 131; Price *v.* Mace, 47 Wis. 23; McNamara *v.* McNamara, 62 Ga. 200.

or recording their deeds when this is made requisite. But the statute of frauds does not apply to a contract to be performed in another country.[1] The due verification of exemplification or copies is determined by the *lex fori*.

XIII. Jurisdiction of Courts and Process.

§ 343. According to the English common law, a local action, *e.g.*, an action for a thing, or for an injury to a thing, which is localized in a particular place, must be brought in a court having jurisdiction of the place where the thing is situate. On the other hand, a transitory action, one which might have occurred in any place, may be brought in any court. In other words, when a cause of action is necessarily bound to a place, the suit is local and must be brought in a court having jurisdiction of such place; when it is not so bound, it may be brought anywhere.[2]

Local action is brought in local courts; otherwise as to transitory actions

§ 344. As a rule, process is determined by the *lex fori*.[3] At common law it is necessary, in order to give jurisdiction, that the summons in personal actions should be served within the jurisdiction of the court. No matter where the defendant was domiciled, if he could be served within the jurisdiction, it was enough; if he could not be served within the jurisdiction, and had no residence there where a summons could be left, and no property to be attached, proceedings could not be formally instituted. By recent legislation in most jurisdictions, however, there may be extra-territorial service, which, in certain classes of suits, may duly institute procedure.[4]

Process determined by *lex fori*. Extra-territorial summons now generally permitted.

[1] Whart. Conf. of Laws, §§ 676 *et seq.*: see Reed's Statute of Frauds, § 16; Fredericks *v.* Davis, 3 Montana, 251.

[2] Whart. Conf. of Laws, § 704.

[3] And see Denny *v.* Faulkner, 22 Kan. 89. As to recent English practice, see London Law Times, Nov. 17, 1883, p. 49; Nov. 24, 1883, p. 57. In Drummond *v.* Drummond, L. R. 2 Ch. Ap. 32, it was held that the court had a discretionary power under the then practice to order a service of a copy of a bill on a defendant out of the jurisdiction. *Cf.* article in Virginia Law Journal for June, 1880.

[4] Whart. Conf. of Laws, §§ 649 *et seq.* On this question see *supra*, § 283; *infra*, § 539.

XIV. Evidence.

Letters rogatory as used to obtain testimony in other countries.

§ 345. When the object is to obtain testimony on the continent of Europe, the proper couree is to issue letters rogatory addressed to the court having jurisdiction over the witness. The examination of the witness is conducted by the judge, who is not bound by the interrogatories, but may put any questions he may deem expedient. He determines as to the privilege of witnesses, as to the form of oath, and as to the mode of requiring the production of documents. Competency and admissibility are to be determined by the court of trial to whom the letters rogatory are returned.[1]

Lex fori determines all questions of evidence.

§ 346. As a general rule, matters of evidence are determined by the *lex fori*, though when questions of evidence involve matters of substance, *e. g.*, the admissibility of proof of a foreign law in subjection to which it is alleged a contract was made, then the *judex fori* will determine the question in conformity to a foreign law to which it is shown to be distinctively subject. But, ordinarily, all questions of evidence, so far as they touch the way in which a case is to be presented, are governed by the *lex fori*. Hence, all questions of relevancy, hearsay, and of parol variation are to be so adjudicated.[2]

Admissibility of witnesses and documents to be so determined.

§ 347. We have already seen that foreign artificial personal incapacities have no extra-territorial effect; and the better opinion, in conformity with this view, is, consequently, that a foreign conviction of an infamous offence does not incapacitate a witness, although such a conviction in the court of the forum would have had that effect[3] *À fortiori*, a foreigner, a party to a suit, will not be precluded from testifying in our courts because he could not have been called as a witness in his domicil.—The proof of documents is exclusively for the *lex fori*. So far as concerns foreign documents, it is generally

[1] Whart. Conf. of Laws, §§ 752 *et seq.* That the court applied to for letters will act according to its discretion, see Boyse, *in re*, Crofton *v.* Crofton, 46 L. T., N. S., 522.

[2] Whart. Conf. of Laws, § 753.

[3] *Supra*, § 266.

held that the seal of a foreign sovereign is self-proving, and that foreign parish records, or duly proved copies thereof, may be received in questions of genealogy.[1]

Foreign law proved as a matter of fact.

§ 348. Of the law, merchant and maritime, and of the elementary principles of Roman and canon law, as systems of general jurisprudence, the courts will take judicial notice. When, however, it becomes necessary to prove what is the law of a foreign country on a particular point, such law must be proved by experts as a matter of fact. When there is no such proof offered, the law of a state whose jurisprudence is based on the English common law will be presumed to be the same as our own on all general questions, though not as to what may be idiosyncrasies in our distinctive jurisprudence.—Foreign statutes are proved by exemplification, unless they be of a class of which the *judex fori*, under statutes or otherwise, takes judicial notice.[2]

XV. Lis pendens.

Prior foreign suit no bar.

§ 349. According to our practice, the pendency of a prior foreign suit for the same cause of action is no bar to a suit instituted in our own courts; and if the cause of action is one which properly belongs to us, the plaintiff, if subject to our jurisdiction, may be enjoined from proceeding in the foreign court. In proceedings *in rem* the first attachment binds.[3]

XVI. Criminal Jurisdiction.

Country where offence takes effect has jurisdiction.

§ 350. Two distinct theories have been advanced as to the basis of criminal jurisdiction. The first, the subjective theory, assumes that jurisdiction over the person of the defendant, either at the time of the arrest or at the time of the crime, gives jurisdiction over the crime. That the place of arrest has jurisdiction, which is the first phase of the subjective theory, is maintained by several European states, such states taking cognizance of all offences committed by persons arrested on

[1] Whart. Conf. of Laws, §§ 769 *et seq.*
[2] Ibid. §§ 771 *et seq.*
[3] Ibid. § 783. See Peruvian Guano Co. *v.* Buckwoldt, 23 Ch. D. 225; McHenry *v.* Lewis, 21 Ch. D. 202.

their shores, while others only entertain such jurisdiction of such persons as are their subjects. The second phase of the subjective theory—*i. e.*, that the country where the offender was at the time of the commission of the crime has jurisdiction—is maintained by many high authorities both in England and in the United States. To this, however, there may be made the following objections: (1) Like the kindred theory of the control of the *lex domicilii* over personalty, it rests on a *petitio principii*. It assumes the guilt of an accused party in order to determine the question of guilt. It says: "We have jurisdiction because *you*, who were with us at the time, committed the offence, and our object in taking the jurisdiction is to determine whether the offence was committed." (2) This theory would permit the perpetrators of some of the most atrocious crimes to escape punishment. A package of dynamite could be sent from England to France or France to America, and, after it had done its work, its forwarder could take up his residence on the very site of the ruin it produced and defy arrest. There would be no jurisdiction over him in the country of the explosion because he was not there at the time. There would be no way of trying him in the country from which the package was forwarded, unless there should be an extradition treaty (of which at present there are none) covering the forwarding of destructive missiles. It may also be urged that to make the presence of the offender at the time a condition of jurisdiction would expose the inhabitants of the belt of our territory bordering on Mexico to assaults from the Mexican side, for which there could be no redress. The better view is to give the country in which the crime takes effect jurisdiction over the crime; and this, which is called the objective theory, is sanctioned by that portion of our legislation which gives our courts jurisdiction (1) over forgery abroad of United States securities, or of perjury before United States consuls; (2) over offences on the high seas; (3) over political offences of subjects abroad; and (4) over offences on the high seas and in barbarous and semi-barbarous lands. By this theory, also, may be sustained numerous English and American rulings to the effect that the forwarder of a libellous letter is indictable in

the place of publication, and that a party who, living at the time abroad, commits in this country an indictable fraud through an agent, is indictable in this country. And this view is also consistent with the provision in the Federal constitution, that a trial is to take place in the place where the crime was committed.[1]

Offences may be cognizable in a plurality of jurisdictions.

§ 351. An offence, when there is a plurality of offenders, or a continuous succession of criminal effects, may be cognizable in a plurality of jurisdictions. This is the case with conspiracies of all classes where there are several overt acts, and with offences begun in one country and completed in another. In such cases, if there be two trials in different countries, the sentence in the second trial should be supplementary to that in the first, the punishment imposed in the first trial being taken into consideration in framing the second sentence.[2]

Extradition generally limited by treaty.

§ 352. Although there have been cases in which the government of the United States has, without a treaty, delivered fugitives from justice to other countries, and has, without a treaty, demanded such fugitives, yet such action has never received judicial sanction; and the better opinion now is, that whatever may have been the law before the settlement of such questions by treaty became general, there can be no extradition except in conformity to treaty. *À fortiori*, when there is a treaty specifying certain offences as grounds for extradition, extradition will not be granted for offences other than those specified. Even for specified offences, surrender will not be ordered when the statute of limitations would for such an offence preclude a prosecution in the asylum state.[3]

[1] See question discussed in Whart. Conf. of Laws, §§ 810 *et seq.*, and noticed *infra*, § 579.

[2] See Whart. Conf. of Laws, § 823; and see *infra*, § 527, as to priority of jurisdictions; see further, *infra*, §§ 444, 524.

[3] See Whart. Conf. of Laws, 2d ed., §§ 835 *et seq.*, where the topic is discussed at large; Whart. Crim. Pl. and Pr., §§ 28 *et seq.*

As to English practice of extradition, see, further, 2 Steph. Hist. Cr. Law, 65 *et seq.*; London Law Times, Dec. 14, 1878; Bouvier, *ex parte*, 27 L. T. N. S. 844; Dipl. Corr. U. S., 1876, Appen. A.

As to practice in this country, see (in addition to cases cited in Whart. Conf. of Laws, §§ 835 *et seq.*), Ker, *ex parte*, Sup. Ct. Ind.; Lane, *ex parte*, 6 Fed. Rep. 34.

§ 353. An executive will refuse extradition in a case in which it is obvious a fair trial cannot be had. It is also generally settled that extradition will be refused when the object of the process is to obtain custody of an insurgent or other political assailant of the demanding state.[1]

Extradition refused when there cannot be a fair trial. and when the object is political.

§ 354. There is no reason why a state having jurisdiction over a crime should surrender the alleged criminal to another state for punishment; and such a surrender would impose on the party surrendered unjustifiable trouble and cost. But surrender, in countries such as England and the United States, which do not base jurisdiction on allegiance, should not be refused merely because the accused is a subject of the asylum state. —A surrender will not be granted when the accused is in custody for another offence of which the asylum state has jurisdiction.[2]

State having jurisdiction ought not to surrender.

§ 355. The words in an extradition treaty, as well as those in the demand and accompanying papers, are to be interpreted in the sense in which they are used in the asylum state. It is not necessary that at the hearing the accused's guilt should be made out beyond reasonable doubt. It is enough if probable cause, such as would justify a binding over for trial, be adduced. To avoid, however, circuity and delay, and to prevent the process from being oppressively used, it is proper that the defendant should be allowed to produce evidence to show why he should not be surrendered.[3]

Terms should be construed as in asylum state. Probable cause enough. Evidence for defence admissible.

As an illustration of irregular arrest, see Exposito's Case, Alb. Law J., Oct. 15, 1881.

[1] This important question can only be noticed briefly in the text. It is fully discussed in Whart. Conf. of Laws, § 839.

[2] Whart. Conf. of Laws, §§ 842 *et seq.*

That a sovereign can demand a person committing a crime on his territory from a sovereign to whom such party is subject, see R. *v.* Ganz, 46 L. T. N. S. 592.

[3] Whart. Conf. of Laws, §§ 851 *et seq.* As to English practice, see Piot, *ex parte*, 48 L. T. N. S. 120; R. *v.* Ganz, 46 L. T. N. S. 592.

That arrest may be in anticipation of warrant, see R. *v.* Weil, 47 L. T. N. S. 630.

For articles on the practice of extradition, see American Law Review for May and June, 1883.

§ 356. Important as extradition is as an instrument for the punishment of crime, there can be no question that it may be so abused as to subject an accused party to extortionate or oppressive demands. To prevent such abuses of a process so critical, several important checks are applied. There should be a full and impartial examination of the case before the commissioner authorized to hear it. The circuit court, from which the commission emanates, has the power of review, and even though by this court the proceedings of the commissioner ordering a surrender be approved, the warrant to surrender may be refused by the executive.[1] It is also held that the surrender may be on such conditions as the executive may impose. The demanding state which accepts surrender on these conditions is afterwards bound by them.

Circuit court may review case, and executive may refuse to surrender.

§ 357. In some treaties it is provided that the accused shall only be tried for the offence specified in the demand. But, apart from such restriction, the trial, as a matter of justice, ought to be so confined. Extradition is a process of high prerogative, and is fraught with consequences too serious to the accused to permit it to be used merely as a pretext to get within the grasp of the demanding state a person who might not have been delivered if the offence for which he was to be tried had been truly stated. It is proper, also, that in so delicate and important a procedure, no material variance between the demand and the indictment used on trial should be permitted. But this does not preclude varying, when the case comes to trial, the statement of the stage of the offence, or of its formal incidents, as where conspiracy to cheat by false pretences is substituted for cheating by false pretences, or larceny for robbery.[2]

Trial should be restricted to offence specified in demand.

[1] The mode of procedure is given in Whart. Conf. of Laws, §§ 842 *et seq.*

[2] Whart. Conf. of Laws, §§ 846 *et seq.* As to practice under Federal constitution, see *infra*, § 541.

The English extradition statutes protect a person delivered on an extradition treaty from being tried for any other offence than that on which he was extradited, until he has had an opportunity to return to his own country. This, however, does not protect him from arrest on attachment. Pooley *v.* Whetham, 15 Ch. D. 435; London Law Times, July 31, 1880, 352.

As sustaining the view of the text see State *v.* Vanderpool, S. C. Ohio, 1883.

For rulings disputing this position, see Whart. Conf. of Laws, § 846.

CHAPTER VI.

CONSTITUTIONAL LAW.

I. Preliminary Considerations.

Constitution the result of existing conditions, § 359.
Prominence assigned to these conditions in construction of constitution, § 360.
The formation of a stable government necessary, § 361.
And so of interposition of such checks as would prevent hasty and ill-considered changes of public policy, § 362.
And so of distribution of power in local governments, § 363.
This policy required by race tendency to institutionalism, § 364.
Government to possess only such functions as cannot be conveniently exercised by people, § 365.

II. Principles of Construction.

American institutions revolutionary, § 368.
In states people are supreme arbiters, § 369.
Constitution not a league, § 370.
Was adopted by the people of the states, § 371.
Confirms sovereignty in the states, § 372.
Recent amendments strengthen this view, § 373.
"Nation" properly applicable to the people of the United States as a body; "State" to the particular states; "Sovereignty" is not necessarily absolute, § 374.
"Territories" not included in term "States," § 375.
In the exercise of powers given to it general government is supreme, subject to restrictions of constitution, § 376.
Importance of preserving constitutional demarcations, § 377.
Coercion of state and maintenance of Federal authority not convertible, § 378.
Limitations in constitution apply to general government unless expressly applied to states, § 379.
Necessity does not abrogate constitutional limitations, but progressive conditions unfold them, § 380.
Powers of state and federal governments may be coördinate, § 381.
State laws followed as to state procedure, § 382.
Treaties and statutes come in *pari passu*, § 383.
Presumption as to unconstitutionality, § 384.
Unconstitutional part may be rejected, § 385.
Statutes must be constitutionally passed, § 386.

III. Relations of Departments of Government.

Legislative, judicial, and executive functions to be kept separate, § 388.
Judiciary cannot supervise matters purely political, § 389.
Dangerous consequences of judicial assumption of such functions, § 390.
Courts cannot compel executive to ten-

tify or exact disclosure of political secrets, § 391.
Courts cannot annul laws because unjust, § 392.
Inconsiderate legislation prevented by reciprocal checks, § 393.
Supreme court not thereby made absolute, § 394.
Senate is the representative of the states, and has coördinate legislative powers, § 395.
House of representatives elected by the people on state franchise, and has coördinate legislative powers; and elects its own speaker, § 396.
Each house determines its own elections and rules; is bound to keep a journal; requires a majority for a quorum; may punish for contempt; is limited as to adjournment; is privileged as to debate, and may expel members, § 397.
President has a qualified veto, § 398.
Civil officers may be impeached, § 399.
Amendments may be made by convention or by action of congress and states, § 400.
Inferences to be drawn from the obstacles interposed, § 401.

IV. Taxation.

Power of taxation vested in congress, but taxing must be uniform, § 404.
"Tax" a generic term, § 405.
Taxation not necessarily conditioned on representation, § 406.
Direct taxation limited to poll and land tax, § 407.
Limitation as to exports does not attach to things that may be exported, nor to embargoes or inspection laws, § 408.
United States government cannot tax state, nor state United States property, § 409.
State taxes imposing terms on imports and on travel are unconstitutional, § 410.
Tax cannot be laid for merely private end, but the fact that a private end will be furthered will not vitiate tax for public purpose, § 411.
Power to tax involves power to establish tax machinery, § 412.
Congress has discretion as to objects, but not as to particular persons, § 413.
Collateral intent to protect does not vitiate tax, § 414.
But not when duties are prohibitive, § 415.
Congress in borrowing money may give proper securities, § 416.
Borrowing implies the right to borrow through a bank, § 417.
State may tax generally, § 417 *a*.

V. Regulation of Commerce.

Power meant to secure freedom of trade between states, § 418.
This required by diversity of climate, of soil, of population, § 419.
State cannot close interstate waters, § 420.
United States has exclusive power of regulating foreign and interstate commerce, § 421.
Commerce may be regulated on land, § 422.
Exception as to matters of necessarily local law, § 423.
Quarantine laws are under state power. So of wharfage and pilotage laws, § 424.
Does not prevent states from exercising police exclusion, § 425.
Restriction does not touch purely interstate transactions, § 426.
Establishing by state of ferries and river improvements not forbidden, § 427.
Power authorizes laws limiting liability of ship owners, § 428.
Extends to rivers and tributary to lakes, § 429.
Tonnage duties prohibited, § 430.

VI. Naturalization.

Congress has power to establish uniform naturalization, § 431.
Persons born in a state are subject to its jurisdiction, § 432.
Naturalization results from annexation, § 433.
Tribal Indians are not citizens, § 434.
Chinese cannot be naturalized, § 435.
Aliens entitled to equal civil rights with citizens, § 436.
Citizenship of a state does not involve citizenship of the United States, and the converse, § 437.

VII. Bankruptcy.

Congress has power as to bankruptcies, § 439.
Jurisdiction extends to cases of insolvencies, § 440.

VIII. Money and Bills of Credit.

Congress may coin money and regulate its value, § 442.
States cannot issue bills of credit, § 443.
Congress may punish counterfeiting, § 444.

IX. Postal Service.

Congress has power to make arrangements for postal service, § 446.
Question whether congress can create "post-roads" is political, and not judicial, § 447.
"Post-office" is any receptacle for mail matter, § 448.

X. Copyrights and Patents.

Power of granting is exclusively in congress, § 450.

XI. Piracies and Felonies.

Congress has jurisdiction over piracies and felonies on the high seas, § 452.

XII. War.

War is the prosecution by a nation of a right by force, and may exist without a formal declaration, § 454.
Property of belligerent may be captured, § 455.
Power to raise armies sustains standing army, and conscription, § 456.
Militia may be called out by general government, § 457.
States subordinated in this respect to the United States, § 458.
Congress may make rules for regulation of army and navy, but cannot supersede civil courts, § 459.

XIII. District of Columbia, Ceded Places and Territories.

In district and ceded places congress has exclusive jurisdiction, § 461.
Congress holds territories in trust, § 462.
Title to land of territories is in the United States, § 463.
Government to be under general safeguards of constitution, 464.
Form of government at discretion of congress, § 465.

XIV. Treason.

Treason works no forfeiture except for life, § 467.

XV. Incidental Powers.

Congress may make laws to carry into effect enumerated powers, § 468.

XVI. Bills of Attainder.

Bills of attainder forbidden, § 471.

XVII. Ex Post Facto and Retrospective Laws.

Limitation relates to criminal prosecutions, § 472.
Law changing procedure not necessarily *ex post facto*, § 473.
Nor are laws modifying rules of evidence, § 474.
Under state constitutions retrospective laws are unconstitutional, § 475.

XVIII. Laws Impairing the Obligation of Contracts.

Constitutional limitation prompted by political and business dangers, § 477.

All legislation impairing antecedent legal contracts invalid, § 478.

Limitation applies to contracts of all kinds executed by state, § 479.

Indebtedness incurred in accordance with state law will be sustained though there be contrary decision by state court, § 480.

Legislation rescinding grants of private franchises or of estates may be invalid, § 481.

Stipulation not to tax may bind, § 482.

Growing doubts as to perpetuity of grants of franchises, § 483.

Distinction between temporary and perpetual engagements, § 484.

Grants to municipal corporations may be revoked, § 485.

License may be withdrawn, § 486.

Charter no protection to a nuisance, § 487.

Charters and grants restrictive of freedom of business may be rescinded, § 488.

State control over oppressive charters may be justified on the ground that this is a regulation of commerce, § 489.

Danger of resting function on the right of state to control business, § 490.

When right of amendment is reserved, charter can be amended, § 491.

Laws modifying remedies are not unconstitutional, § 492.

But not when the obligation of the contract is impaired, § 493.

Statutes modifying evidence are not unconstitutional, § 494.

State discharges do not bind citizens of other states, § 495.

Marriage not within limitation, § 496.

Nor is tenure of public office, § 497.

State constitution may conflict, § 498.

XIX. Powers of Executive.

President commands army, navy, and militia, § 502.

Has no power, as commander-in-chief, to dispense with law as a system, § 503.

Cabinet composed of heads of departments, § 504.

President, with advice and consent of senate, may make treaties, § 505.

Treaties are in some respects self-enforcing, but not in respect to matters requiring legislative action, § 506.

President has power to reprieve and pardon, § 507.

Exception as to impeachment and contempt, § 508.

Pardons may be conditional, § 509.

Pardon before sentence remits costs and penalties, § 510.

President has power of appointment and removal, § 511.

Has qualified legislative functions, § 512.

Cannot be controlled by judicial writ, § 513.

XX. Powers of Judiciary.

Judicial power of the United States extends to cases under United States constitution, laws, and treaties; to cases of admiralty and maritime jurisdiction; and cases in which the United States or states are parties, § 516.

Judicial powers are in the main apportioned by congress, § 517.

Supreme court has no general or final jurisdiction, § 518.

Supreme court has final jurisdiction in all conflicts with state courts as to Federal constitution and laws, § 519.

"Citizen" in the clause giving Federal courts jurisdiction means "resident," § 520.

By statute cases may be removed from state to Federal court, § 521.

itical questions not of judicial cognizance, § 522.
Admiralty and maritime jurisdiction to be distinguished, § 523.
Federal courts have no common law jurisdiction of crimes, but statutory jurisdiction is exclusive, § 524.
Territorial courts may be constituted by congress, § 525.
Federal courts adopt state rules and practice as to state questions, § 526.
In questions of concurrent jurisdiction, tribunal that first takes control retains it, § 527.
United States may be sued in court of claims, § 528.

XXI. States as Parties.

Controversies between states include questions of boundary, § 530.
States must be the real parties to sue, § 531.
States can no longer be sued by individuals in Federal courts, § 532.

XXII. Habeas Corpus.

By Federal judge limited to cases involving Federal laws, § 534.
State court cannot discharge on Federal commitment, but Federal court may on state commitment, § 535.
Power to suspend belongs to congress, § 536.

XXIII. Reciprocal Rights.

Public acts and records of each state to be recognized in other states, § 538.
Question of extra-territorial service still open, § 539.
Citizens of each state entitled to citizenship in other states, § 540.
Fugitives from justice to be surrendered, § 541.
must be "fleeing" from justice, § 542.
demand must be based on *prima facie* case of crime, § 543.
arrest may be had in advance of requisition, § 544.
no defence that defendant is amenable in asylum state, § 545.
Fugitive not privileged from any but specified charge, § 546.
Governor of asylum state cannot be compelled to act, § 547.

XXIV. Guaranty of Republican Institutions.

Guaranty does not extend to suffrage or distribution of powers, § 549.
nor to social equality, § 550.
nor to exemption from revolution, § 551.
but may sustain reconstruction after government has been suspended, § 552.

XXV. Religious Tests.

Neither religious test, nor establishment of religions permitted, § 553.

XXVI. Freedom of Speech, of Petition, and of Bearing Arms.

Freedom of speech not to be abridged, § 555.
Right of petition guaranteed, § 556.
Right to bear arms not to be infringed, § 557.
Quartering soldiers forbidden, § 558.

XXVII. Unreasonable Searches and General Warrants.

Unreasonable searches and general warrants forbidden, § 560.

XXVIII. Safeguards of Liberty and Property.

Grand jury requisite in felonies and infamous crimes, § 561.
No one to be put twice in jeopardy for same offence, § 562.
Party cannot be compelled to criminate himself, § 563.
Life, liberty, or property cannot be

taken without "due process of law," § 564.
This does not apply to police restrictions, § 565.
"Due process of law" means law which is constitutional and consistent with common law rights, § 566.
Private statutes quieting title not unconstitutional, § 567.
Defects of formal incapacity may be cured, § 568.
Private property cannot be taken without compensation, § 569.
Rule applies to real estate, § 570.
Property must be vested, § 571.
Sovereign has right of eminent domain, § 572.
United States government may exercise the right for Federal purposes, § 573.
Must be for public use, § 574.
Franchise may be thus taken, § 575.
Exercise of right must be by general law, except in cases of necessity, § 576.
Power may be delegated, § 577.
Compensation must be fairly adjusted, § 578.
Defendant entitled to an impartial jury of place of crime, to be informed of the nature of the charge; to have compulsory process for witnesses and have counsel, § 579.
Excessive bail and "cruel and unusual punishment" forbidden, § 580.
Jury trial secured in United States courts, § 581.

XXIX. Reconstruction and Civil Rights.

Slavery and involuntary servitude prohibited, § 584.
Citizenship confined to white and negro races, § 585.
Prohibition limited to state action, and not applicatory to discrimination by persons or corporations, § 586.
Laws imposing penalties on marriage between the races not unconstitutional, § 587.
Equal protection of laws granted to all persons, § 588.
Basis of representation to be reduced in proportion to abridgment of right of suffrage, § 589.
Validity of public debt not to be questioned, and assumption of insurrection and emancipation debts prohibited, § 590.
Legislation in support of this and other amendments must be "appropriate," § 591.
Negro suffrage granted, § 592.
Binding effect of reconstruction amendments, § 593.
These amendments limit state interference with private rights, § 594.
They are more conducive to business prosperity than clause protecting contracts as construed in Dartmouth College Case, § 595.
They do not disarrange but make manifest equipoise of constitution, § 596.

I. Preliminary Considerations.

§ 359. Before proceeding to examine the constitution in detail, it is important to consider what were the conditions under which it was framed. In investigating these conditions we are not concluded by expressions of opinion by members of the constitutional convention. Organic laws, like all other laws, are the product of the conscience and the necessities of the people

Constitution the result of existing conditions.

from whom they emanate and by whom they are accepted.[1] No law, constitutional or statutory, is effective unless declaratory;[2] and in determining what the law really is—in other words, to get at the real law of which the formal law is the declaration—we must penetrate to the people, who are the primary law constructors as well as the adopters of the law. Nor is it sufficient to inquire what the people did or said. Primary law-making is unconscious and instinctive; it comes without observation; we must examine, in order to understand its processes, the forces by which it was produced, and the environments to which they were subjected.[3] Hence, while in construing the constitution it is proper to take into consideration the views expressed by the members of the constitutional convention, we must remember that the constitution was evolved in a large measure unconsciously from the conditions in which the community was placed; and it by no means follows, because the formal framers of the constitution succeeded in giving substantial expression to the national conscience and needs, that what they said is equally authoritative with what they did and with what caused their action. In combining, for instance, the two great political factors of the country—the states and the people of the nation—some of the framers of the constitution may have given wrong reasons for a conclusion which was the expression of a national duty and necessity; and it is conceded on all sides that while the clause providing for an electoral college responds to the sense of right and sense of expediency in the nation as a whole, the intentions of those who put it into technical form were very different from the instincts of the constituencies they represented as effectuated in its practical working. It was not in accordance with the people's sense of right and sense of need, that they should part with the prerogative of choosing their chief magistrate. Chosen in such a way as to recognize state demarcations he was to be; yet by the people themselves the choice was to be made. Hence, in construing this and similar clauses which have taken a practical meaning different from

[1] *Supra*, §§ 14, 19.

[2] *Supra*, § 27.

[3] *Supra*, § 22. "We cannot escape history." Close of Mr. Lincoln's message of Dec. 1, 1862, where this position is pressed; see further, § 593.

that assigned to them by the members of the convention,[1] we must go to the past and cotemporaneous conditions of the country as the primary source from which the meaning of these disputed terms is to be drawn. So it is with the constitution as a whole. It was declaratory, not of the views of its formal framers, though these views are always interesting, but of the conditions under which they acted; and the permanency of the constitution is due to the faithfulness with which it represented these conditions. Hence, in construing it, we are to consider, not merely, nor even chiefly, what was said by the members of the constitutional convention, but the conditions under which they acted. In other words, as the constitution was the effect of political conscience and need of the people, it is essential in construing it, that such conscience and need should be taken primarily into account.

Prominence assigned to those conditions in construction of constitution.

§ 360. What has been said serves to explain the drift of the arguments published by the judges of the supreme court of the United States, and by the great lawyers who have appeared before them, when seeking to determine the meaning of the constitution.[2] In these arguments, whether consisting of opinions of judges or of speeches of counsel, it is to be noticed that the chief place is assigned to the consideration of the conditions which acted on the country both before and during the framing of the constitution, while the speeches of the members of the constitutional convention occupy but a subordinate position. As instances of this mode of exposition may be mentioned, the opinions of the judges of the supreme court of the United States in the legal tender cases, on the reconstruction cases, on the case involving the constitutionality of the statute prohibiting polygamy in the territories. Rare, indeed, are the citations in these documents from the views expressed by members of the constitutional convention. On the other hand, the whole history of the country is appealed to in each case to show what was the country's mind in establishing the constitutional provisions under discussion.[3] And

[1] *Supra*, § 19.

[2] *Infra*, § 612.

[3] If we analyze, for instance, the opinion of Chief Justice Waite in U. S. v. Reynolds, 98 U. S. 145, we shall find it bases the constitutionality of the ter-

this is the more remarkable from the fact that this reference to the history of the country is not made for the purpose of showing that the country acts as a democracy, and that therefore its views, when so acting, are to be ascertained. So far from this being the case, it is assumed throughout that this is not only a constitutional government, and therefore a government under complicated checks and balances, but that the past history of the country shows that this has always been the case. What we can understand the courts as saying in these and other cases is that certain forces were operating in producing a government of a particular type, and that in order to determine the type they explore the forces. That this is a far more legitimate way of getting at the meaning of the constitution than is the searching of the speeches of the members of the constitutional convention, cannot be questioned. Public men do not always give the real reason for their acts; their acts are produced by the conditions under which they act, but their speeches do not necessarily exhibit those conditions, and if they did, the proof they would give would be secondary, not primary. Hence it is, that in the opinions before us the courts, by what is called judicial notice, take within the field of their consideration, as elements by whose aid the constitution is to be construed, the whole of the country's past and present. And this is necessary. Not only is language itself a product of the past—not only is there no single disputed word that we can understand without taking into view its history—but the constitution itself is, as

ritorial polygamy statutes: (1) On the supremacy of the general government over the territories as shown by the history of the country; (2) On the incompatibility of polygamy with the public sense of right, as also historically shown. The same line is followed in the opinions on reconstruction. Such is the line, also, adopted by Mr. Webster in his great argument in the case of the Rhode Island government (6 Webster's Works, 220 *et seq.*). The question was whether a state constitution could be amended by a popular vote without prior authorization from the legislature. He denies this, and he rests his conclusions on two positions: (1) The past of the country shows that without legislative initiation no constitutional changes have been made; (2) The conscience of the American people, following in this respect their English ancestors, is institutional so far as concerns government; liberty is essential, but it must be liberty according to rule. That this is the case in the construction of statutes, see *infra*, § 612.

we have seen, the result of a combination of agencies which individual statesmen, no matter how eminent, may have interpreted, but did not create. And even the interpreter may have erred in the words which he used to express these forces. To truly construe the constitution we must go behind his words, and go back to the forces themselves.

§ 361. The first necessity at the time to the people of the United States was a stable government; and to this they were prompted by a sense of duty as well as by a sense of need.[1] The confederate congress, which had been instituted as a makeshift during the war, had proved to be miserably inefficient. Such a government was like a tenancy at will, giving no title that strangers could trust, no sense of permanency to the occupants of the soil. A government such as that of the old confederation, which might at any time be dissolved, and which had no power to enforce obedience from its members, could not, so they felt, win respect abroad, or establish order and prosperity at home. The debility and decadence of the old German empire, so they were aware, were attributable to the power assumed by the states that composed it of nullifying the decrees of the empire, and waging war, when they chose, upon their common head. The traditions of England, which were also the traditions of the people of the United States, were to the same effect. While in England the right of revolution, if not conceded, had been acquiesced in, even the most liberal whigs held that when a government was once established, nothing but successful revolution could sever its component territories. Cromwell and William III. ruled by right of revolution, yet no English sovereigns insisted more vigorously than Cromwell and William III. on the maintenance of the integrity and indivisibility of British rule. The people of the United States, however much they may have been distracted by provincial jealousies, or by subordinate

Formation of a stable government necessary.

[1] The dissatisfaction of the people with the Continental Congress, and the impotent state in which congress had fallen in the period between the peace and the formation of the constitution, are exhibited with great vivacity and fulness in McMaster's History of the People of the United States, vol. i. chap. iv.

distinctive traditions of creed or of caste, felt, as to the fundamentals of government, as one body. The territory they occupied was compact, separated by no natural boundaries. They spoke the same tongue. They had, in the main, the same religion. They had the same general conceptions of government; among the settlers there were English republicans and English whigs, but very few English tories; and the whigs and republicans, at the revolution, took common ground. Slavery, afterwards so disastrous an agency of dissension, formed but a slight obstacle to union in those days, since the most of the leaders of opinion in the south deplored slavery, and most of the leaders of opinion in the north felt that the north had been so active in establishing it that it was not for them to make it a ground for disunion. The provinces, also, were interdependent; to sever the north from the south would be to sever the commercial from the producing factors; there was not a state which could be dropped out of the union without injury to the others; their staples were distinct; the prosperity of each state was dependent on that absolute freedom of trade which a stable Federal government alone could secure. The foreign relations of the states, also, demanded that they should be cemented in a union to whose direction such foreign affairs should be distinctively subjected. Were it not so, the states, dealt with singly by the participants in the great European struggle then beginning would be entangled in that struggle, and thus led not only to enter into a European war, but into a war among themselves.

So of interposition of such checks as would prevent hasty and ill-considered changes of public policy.

§ 362. It was also a necessary consequence of the condition of things that the government to be instituted should be more or less immediately appointed by the people. The very fact of revolution prescribed a popular basis; no other government than one chosen by the people was possible. The traditions of the constituencies pointed in the same direction. The English colonists, taking them as a whole, had sympathized, in pre-revolutionary contests, with English whigs. Yet it must be remembered that English whigs, while always vindicating parliamentary insti-

tutions, and while resting, as they did in the convention of 1688, the right to govern on the will of the people, had never maintained that this will was to be collected from sudden popular appeals made either by the executive or by revolutionary leaders.[1] From the results of such appeals, the whigs, as a party, had peculiarly suffered. The protectorate established by Cromwell might, after his death, have been continued, under his son's administration, on constitutional principles; but, by a sudden impulse, Charles II. was recalled, and the Stuart family reinstated without the imposition of a single check. Had there been time taken to ascertain the deliberate intentions of the English people—had the question been discussed so as to bring to mind what had taken place under Charles I., and even under Cromwell himself—there can be no doubt that Charles II., on his return, would have found himself so bound by constitutional fetters as to have been precluded from indulging either in the personal profligacy or the political outrages by which his reign was disgraced. The colonists, also, would naturally have remembered that towards the close of Queen Anne's reign the whig party had been temporarily crushed, and an ominous triumph secured for the tories, by the queen seizing on a moment of popular excitement to dissolve parliament, and in this way, by force of a sudden impulse, to reverse the policy which had placed William III. on the throne, and which had triumphed over the insolent supremacy of France. The colonists had been themselves used to slow legislation. Their laws, in fact, had grown up under their eyes by processes so slow as to be unobservable; to this slow growth their most valuable laws were imputable;[2] enactments precipitately adopted, or adopted on *à priori* speculative grounds, had proved to be inoperative or detrimental.[3] Nor were the local traditions of the people such as to stimulate rapid experimental legislation. Burke's statement, that legislation to be effective must be merely declaratory,[4] had no doubt sunk deeply

[1] See as to Burke's views, *supra*, §§ 27, 28, 53, *infra*, § 365.

[2] See *supra*, §§ 24 *et seq.*

[3] *Supra*, § 21.

[4] *Supra*, § 27.

in the popular mind, because it was expressive of the popular instincts. Nothing strikes a doctrinaire politician as more remarkable than the slowness of colonial legislation. Such legislation, in fact, throughout the colonies, appeared to have been an outer scaffolding, only kept on while the work of interior instinctive law-making was in progress. The colonial traditions of the people, therefore, pointed not to a government by *plebiscite*, but to a government so checked and balanced as not to interfere with the growth of instinctive law.[1] There was, of course, to be formal legislation, but it was to be legislation expressive of conditions then existing; and this could be secured by the multiplication of legislative checks. There should be no such thing, so it must have been felt, as snap judgments in politics. There should be no repetition of such a surprise as that by which Monk seized upon a particular moment of popular disgust and weariness to establish a despotism from which he, indeed, was to receive enormous bribes, but which was to cast aside with scorn every safeguard of liberty which had been wrung from Charles I., and had been embodied in the bill of rights. It should not, also, be made easy for any one election, as was the case with the election held during the Sacheverell excitement in Queen Anne's time, to reverse the settled policy of the state. The *plebiscite*, by which by a popular verdict, taken at some particular moment, momentous public action is determined, was inconsistent, so it must have been held, with the conditions and traditions of the land. Government, it is true, must be directed by the current of the popular will, but this current must be regulated by locks and dykes, so that its flow may be equal and beneficent. There should be no appeals to the people at any moment which the executive might select, or which a potent parliamentary leader might force. Elections ought to come at fixed periods; the legislature should consist of two houses, the members of one of which, at least, should hold by a tenure long enough to relieve them from the operation of any sudden and temporary popular caprice; and these should represent constituencies so essentially distinct that

[1] *Supra*, § 28.

hey would not be likely to give way simultaneously to any ne particular and exceptional wave of popular feeling.[1]

So of distribution of power in local governments.

§ 363. A primary object, then, of the constitutional convention was the construction of a supreme legislature to consist of two chambers so representing distinct constituencies as to be likely not only to prevent inconsiderate legislation, but to make possible he representation of the states as such, as well as the representation of the people as a nation. One of these chambers was ecessarily to consist of representatives chosen directly by the eople distributed in electoral districts throughout the whole ountry.[2] The task of constructing the other chamber was nade comparatively easy by the fact that the population vhom the convention represented, so far from being a homogeneous mass divided by merely arbitrary lines, consisted of hirteen distinct states, each with its own peculiar form of ocal government; its own peculiar historical traditions; its

[1] Mr. Madison, in the Federalist, ook strong ground against the posiion that a majority of the people of he entire country was to rule the ountry.

"Were the people regarded in this ransaction as forming one nation," e argues, "the will of the majority f the whole people of the United tates would bind the minority; and he will of the majority must be dermined either by a comparison of he individual votes, or by considering he will of the majority of the states s evidence of the will of a majority f the people of the United States. Neither of these rules has been dopted. Each state, in ratifying the onstitution, is considered as a sover-ign body, independent of all others, nd only to be bound by its own oluntary act. In this relation, then, he new constitution will, if established, be a *federal* and not a *national* onstitution."

See *supra*, § 19.

"The people often *limit themselves*. They set bounds to their own power. They have chosen to secure the institutions which they establish against the sudden impulses of mere majorities." Mr. Webster's speech on the Rhode Island government, 6 Webst. Works, 224.

"The distinguishing feature of our government is, that it is the only one which attempts to restrain and check this power (of majorities), although it may be acting in accord with the popular will. In other words, it is the only government which attempts to protect the rights of minorities and of localities against the power of majorities; and for that purpose it has worked out a political organization, unparalleled in any other country or in any other period of the world's history." Gov. Seymour, North Am. Rev., Sept. 1878, p. 305; see, *per contra*, article by the late Gov. Morton, North Am. Rev., July, 1877, p. 68.

[2] See *infra*, § 377.

own national pride; its own distinctive business type. If one chamber was to consist of representatives elected by the people directly in proportion to population, the other chamber would naturally consist of delegates representing the separate states as units, the same representation being given to each state. In this way not only would deliberateness and maturity of legislation be secured, and the new government relieved from the shock of sudden popular impulses, but, in giving expression to the fact of state sovereignty, another important essential of stable political institutions, that of the due distribution of power between central and provincial sovereignties, would be secured. Even the most sanguine of the members of the constitutional convention could not have supposed that within a century from the period in which their deliberations took place, the country whose constitution they were to frame was not only to be the richest in the world, with products the most various and industries the most diverse, but was to combine under a common free government new states embracing the Mississippi Valley and the shores of the Gulf of Mexico, and extending to the Pacific Ocean, with a territory exceeding in extent the whole continent of Europe, producing natural staples in most lines superior to what Europe could produce. This could not have been foreseen; and it could not therefore have been then argued, as it may now be argued with such great force, that no Federal legislature could have leisure, or capacity, or information sufficient to enable it to enact laws suitable for the municipal government of all the separate parts of which so vast and so diversified an empire was to be composed. This the members of the convention could not have foreseen; but it was unconsciously felt in advance by the people for whom the members of the convention spoke. For, while there was much that was persistent and adhesive in the temper of the people who had settled the United States, there was also much that was propagandist and nomadic in that temper. They had crossed the Atlantic, some of them to seek their first homes on the sterile coasts of New England; others to occupy, even in more temperate zones, "territory where savages roamed, and in which they were out of the reach of the protective power of their native

land." It was not likely that they would remain clinging to the seaboard. Whatever may have been the calculations of statesmen, the instinct of the people, inarticulate and unconscious as it may have been, was to project itself westward until the limits of the continent were reached. One of the first indications of this movement was the cession by the seaboard states to the confederacy of their western lands as the materials from which new states were to be formed. Another indication was the popular movement, quiet and spontaneous but none the less dominant, by which the plans of leading statesmen for the abandonment of the navigation of the Mississippi were frustrated. The tendencies of the nation, therefore, were at once to expansion and to demarcation; to the erection of an empire that should embrace a continent, and yet of an empire which, as an essential to its own maintenance, should leave the work of local municipal government in the hands of the component states. The one necessitated the other; the impulse to imperialism involved the impulse to state sovereignty in its proper sphere. And though the members of the constitutional convention may not have shared these aspirations, there were pregnant facts of which they could not be oblivious. They had themselves been elected, not by the people irrespective of the legislatures of the states, but by the legislatures of the states irrespective of the people. There were then only thirteen states, but these states constituted virtually distinct nations, with separate flags, separate supreme legislatures, separate historical traditions, each with its own state pride and state antagonisms. In the southern states slavery was established and protected by law; in the northern states it was at best in the process of abolition. In Massachusetts, New Hampshire, and Connecticut the Congregational church was established as a "standing order," and other religious bodies were more or less depressed; in the other states no discrimination between churches was retained. In the New England States measures were adopted for compulsory education; in the other states education was in the main voluntary. In the New England States the territory was parcelled out into "towns," which were little sovereignties in themselves, with power of taxa-

tion for town objects, and of religious and secular municipal supervision; in the other states no such subdivision was known, though from time to time special municipalities might be constituted when requisite. Maritime and manufacturing interests predominated in the north; planting interests in the south; while the western territory, under the control in the main of New York, Pennsylvania, and Virginia, required specific legislation to protect it from Indian invasion and to duly provide for the peculiar pioneer population drawn to its wilds.[1] Aside, then, from the control exercised by state pride and state antagonisms, which would not tolerate the obliteration of state lines and the destruction of state sovereignty, the traditions and instincts, as well as the necessities and sense of right of the new empire, required that the jurisdiction of state governments should be preserved, and that only so much of that jurisdiction should be ceded to the Federal government as was necessary to make that government supreme in its dealings with foreign states and supreme in matters essential to the preservation of the union and the furtherance of interests distinctively federal.[2]

[1] As to other points of difference see *infra*, § 377.

[2] Mr. Freeman, in his History of Federal Governments, says: "Two requisites seem necessary to constitute a federal government in this its most perfect form. On the one hand, each of the members of the union must be wholly independent in those matters which concern each member only. On the other hand, all must be subject to a common power in those matters which concern the whole body of members collectively." See, also, *supra*, § 19; *infra*, § 377, as to other specifications of difference.

"Extending over an immense territory, and comprising a numerous population, having a common language and manners, and, in all important particulars, a common interest, yet separated into rival states, of unequal magnitude and power; no single government, without despotic power, would be sufficient for the whole. If, on the other hand, the states were completely sovereign and independent, each pursuing all the powers of government, and united only by a league, the uniform experience of the world proves that they would have been liable to constant dissensions, which would almost inevitably lead to civil wars, embittered by the very similarity of manners and feelings of friendship which had formerly united them. The present system is a happy medium between the extremes." Bayard on the Const., 164.

Mr. George T. Curtis, in an article in Harper's Magazine for June, 1880, after speaking of the action of the framers of the constitution as above stated, adds: "*It is true they were compelled to do this, for they could not otherwise have established any constitution at all.*"

§ 364. To the tendency to territorial institutionalism peculiar to the English race, is to be attributed the ascendency obtained by the English over the French colonists in America. The French, so far at least as concerns the regions watered by the St. Lawrence and the Mississippi, were the first on the field. French miners were on Lake Superior a century before the rich mineral fields of that region were known to visitors of English descent; French missions were on the lakes and on the western rivers far in advance of missions whose services were conducted in the English tongue; French zeal and courage were the first to establish fortresses which, in advance of emigration, held the Indians in check; French pioneers, two hundred years ago, prepared maps of the Mississippi Valley, whose accuracy in many respects are still unsurpassed. Yet French supremacy has vanished from North America, vast as is the number of persons of French descent who remain in Canada and in Louisiana. The reasons of this yielding of French to English supremacy may be specified as follows: (1) The loyalty of the French was not so much to the nation as a corporation, as to the king of France as a secular, and to the pope as a spiritual sovereign. (2) English colonization is subject to the instinct of radiating adaptive institutionalism; French to the instinct of exact reproduction of the home type. We have this illustrated even in our day in the pertinacity with which, under the French code, the social and political status of a Frenchman adheres to him wherever he goes.[1] If he cannot marry at home without parental consent, he cannot marry abroad without such consent; if under tutelary restraint at home, he is to be regarded as under tutelary restraint everywhere. In the French colonies in America this was brought out in bold relief. There was no local government, and no desire for local government. The laws that were enforced were ordained in Paris or Rome, or, if of local adoption, were closely imitated from the French models. There was apparently a vigorous plant, but it was fed by a side-root from the parent tree.

Development of local government induced by race tendency to territorial institutionalism.

[1] *Supra*, §§ 266, 273.

When this was severed the political existence of the French colony perished. On the other hand, the English colonies took independent root in the soil in which they were planted. Their genius was institutionalistic, and this genius operated as of necessity. On the soil they occupied they were thus impelled to erect such political structures as were adapted to it and them. To this the survival of English over French colonies is due; and to this same instinct may be traced the conspicuous position assigned to local government in our American system.[1] Whatever functions of administration cannot be exercised by the states or the people, are to be given to the Federal government, and as to such enumerated functions the Federal government is to be supreme. But in all other matters the states or the people have control.

Government only to possess such functions as cannot be conveniently exercised by the people.

§ 365. One other principle, at the root of our constitutional system, may be noticed as a necessary emanation of the then condition of things. We have already seen that the wise and humane system of municipal law which had grown up in the states, had come into existence not only without the co-operation of the sovereign, but often in the teeth of the opposition of the sovereign.[2] This fact had been solemnly recited in the Declaration of Independence, and had been the basis of almost every revolutionary appeal; nor, even had it not been thus conspicuously kept before the public eye, could the people have lost sight of the fact that it was by the undemonstrative instinctive action of the community as a whole, that the best laws that were in force had originated, while to the interference of the British sovereign and parliament most of the evils to which the country had been subjected were due.[3] Nor was the distrust of legislation thus

[1] See this position illustrated with much freshness in Mr. Scott's "Development of Constitutional Liberty," (N. Y. 1882) pp. 29–50. And, see *infra*, § 462.

[2] *Supra*, §§ 29, 111.

[3] Thus the delegates from the south could unite with the delegates from the north, in recalling instances in which the assumption by Great Britain of the control of the local affairs of the colonies had inflicted on the colonies serious and sometimes irreparable evil. In 1719, for instance, the South Carolina Legislature passed a statute imposing a fine of forty

engendered lessened by what had been seen of the operations of the state legislatures or even of the Continental Congress. As long as the action of these bodies had been, in Burke's meaning of the term, declaratory, so long had they occupied a commanding position both at home and abroad. But as soon as they had recourse to legislation that was experimental and speculative, they ceased, able and patriotic as were some of the men of whom they were composed, to receive public respect; and it may be questioned whether even of congress the average standard of political sagacity was at any time up to the level of that of the people at large.[1] Nor was the conviction that from mere formal legislation little good was to be expected, the only element which contributed to the restriction of governmental functions within narrow limits. The policy of England, in interfering with colonial manufactures and trade, had been bitterly resented. The people were convinced that if they were to prosper in business, their business should be regulated by themselves. Dr. Franklin has been often referred to as moulding public opinion in this relation, and by his maxims establishing a popular political economy. But it was public opinion that moulded Dr. Franklin, to whose sagacity of perception and felicity of expression the diffusion of this public opinion is due; and the popular political economy dictated his maxims, not his maxims the popular political economy. When he declared that no laws could be better than the people, and that government should not do what the people could do for themselves, he merely spoke what the conscience, the traditions, the conditions, the needs of the people dictated. By

pounds on all imported negroes. "Had this measure been carried," so writes a recent able English historian (Doyle's English Colonies in America, 1882, p. 388), "it must have put an end to the slave trade as far as South Carolina was concerned. It is sad to think that such a measure was frustrated by the cupidity and jealousy of the English government. But it had become a settled maxim of colonial policy to allow the provincial assemblies no control over external trade, and in all commercial legislation to regard the profit of the English merchant rather than the social and industrial well-being of the colonists. The proprietors and the crown were for once united, and the measure was vetoed," see *supra*, § 112.

[1] As to short coming of local legislation, see *supra*, §§ 23, 24; *infra*, § 595.

Jefferson this position had been enforced with characteristic enthusiasm and eloquence in his letters to Madison; by Madison it had been proclaimed with grave dignity as incontrovertible; it had been assented to by Hamilton. It is not strange, therefore, that this distrust of legislation should find expression in numerous restrictions in the constitution on the powers both of states and of general government; and that ultimately it should be provided by an amendment that all powers not expressly given to the general government should remain in the states or in the people thereof. This was not a *doctrinaire* speculation. It was not a fiction of statesmen desirous of establishing a balance of power. It was the voice of necessity and of right. It was what was exacted by the traditions of the past, the conditions of the present, and the conscience of both. The final expression of this distrust of legislation is to be found in the fourteenth amendment by which the power of the state legislatures is so far curtailed as to preclude them from passing any laws taking private property without due process of law, or making any discrimination as to the enjoyment of civil rights.[1] The more conspicuous immediate effect of the reconstruction amendments no doubt was to give the negro race, not only freedom, but political equality with what had been previously the dominant race. But the effect of these amendments in this respect is temporary compared with their general effect. They emancipated the negro and established equality of civil rights, but there, so far as concerns any discrimination of races, they stop. They do not give the negro any special privileges; they merely prohibit any legislative discrimination being exercised against him. As we contemplate these important amendments, the civil war which ostensibly produced them, and the particular race for which they are supposed to have been adopted, vanish, and what remains are the fundamental provisions, applicable to all races alike, that the property of no person, whoever he be, shall be taken without compensation, and unless by due process of law; and that to no person shall

[1] That this protection is extended to corporations, as well as to private persons, will be hereafter seen, *infra*, §§ 588–594.

equal rights be refused. Even had there been no civil war, and no race, heretofore enslaved, to be liberated, this provision would have been essential to perfect our political system, so as to establish the principle that there shall be no interference by legislation, either state or federal, with either private property or equality of personal rights [1]

[1] See more fully, *infra*, §§ 594–6.

Burke, in his speech on the conciliation of America, gave the following reasons for the "fierceness" of liberty in the colonies: "(1) descent; (2) colonial forms of government; (3) religion in the northern provinces; (4) manners in the southern; (5) education; (6) remoteness of situation." Under the sixth head he included the incapacity of the British government to govern colonies separated by three thousand miles of ocean, which it took at least a month to traverse; and the consequent throwing of the people on their own resources, thus virtually inaugurating the *laissez-faire* system. (Scott, Development of Constitutional Liberty, N. Y. 1882, p. 30.)

The colonies becoming thus accustomed to leave to individual enterprise and competition that which under the older systems was undertaken by government, it is not strange that in framing a central Federal government the framers of the constitution should confer on such Federal government only enumerated and restrictive powers. The colonial government was necessarily individual government, since the function of legislation on many topics remained in abeyance. Parliament did not exercise it from 'remoteness;' the colonies did not exercise it from want of jurisdiction. See Scott's Development, etc., *ut supra*, 220.

But be this as it may, there were few American statesmen in whose minds prosperity was not associated with freedom from legislation in all matters which could be controlled by individual action, and who did not base the revolution on the abandonment of this principle by the Grenville administration. Mr. Grenville, so it was said by Horace Walpole, when afterwards, as Earl of Orford, contrasting the Grenville ministry with that of his father, lost America by reading American despatches. (Lord Orford's Memoirs, ii. 32.) To the domineering and laborious temper of Grenville, knowledge of a thing to be regulated prompted at once an attempt at regulation; and this played into the hands of George III., to whom parliamentary checks were odious, and who would gladly have transported to America the absolutism of Hanover. It was natural that the people, who had reluctantly severed their relations with England in consequence of this interference of government with personal rights, should have made freedom from such interference one of the chief principles of the new constitution. And there were few thoughtful men in the country who did not accept the position taken by Burke in his speeches on American conciliation. "It ought to be the constant aim of every wise public council," says Burke, "to find out, by cautious experiment and rational cool endeavors, with how little, not how much, of this restraint (on liberty) the community can subsist. For liberty is a good to be improved, and not an evil to be lessened. It is not only a private blessing of the

II. Principles of Construction.

American institutions revolutionary.

§ 368. The Declaration of Independence starts with the assumption that an oppressed state has a right, when its liberties are materially invaded, to appeal to arms to throw off the yoke of the oppressor. This right was asserted in the revolution of which the declaration was the proclamation. The colonies, acting through the Continental Congress, had not even the show of legitimacy which was clung to by those concerned in setting up the throne of William III. There had been no withdrawal from or abandonment of royal functions by George III. as there had been by James II. When James II. fled from London the house of peers which welcomed his successor

first order, but the vital spring of energy in the state itself, which has just so much life and vigor as there is liberty in it." It has been the fashion to say that we borrowed these doctrines from French doctrinaire philosophers. This is not so. Among the people from whom the revolution sprang, French philosphers were unknown. But Burke's speeches on America found their way into every American home where there were readers; and Burke's abhorrence of speculative legislation, his maintenance of the necessary coexistence of liberty and law, his upholding of the merely declaratory character of all true legislation, his vindication of the right of nationalities to develop their own distinctive systems, his advocacy of checks by which legislatures would be prevented from smothering this development, were accepted as part of the popular American faith. If the doctrines of *laissez faire* and of evolution were received in this country as authority, it was on the authority of Burke. And when from time to time those doctrines are stated, it is consciously or unconsciously in Burke's own terms. By no one, as will be hereafter seen, has this been done more effectively than by Mr. Lincoln in his speeches and letters on reconstruction. *Infra*. § 593. We have another illustration of this in the following from an opinion lately given by Chief Justice Waite. "A good government never puts forth its extraordinary powers except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people." (Waite, C. J., Chicago, etc. R. R. *v.* Iowa, 94 U. S. 155.) Over and over again was this truth stated, though in other words, by Burke in his speeches on America, as well as in his publications on the French revolution. See *supra*, § 53. The influence exercised in this country by Burke is evidenced not only by the warm approval of his course in resolutions of colonial assemblies, but by the fact that there is scarcely one of the original states which did not call after him a county or a town. "Throughout America his name was venerated and beloved." Garland's Life of Randolph, i. 52.

was the legitimate successor of the house of peers which had existed since the memory of man; and the convention house of commons, though irregularly constituted, contained no member that had not been duly elected to serve in one of the prior parliaments. With us the fissure went to the very bottom of the social structure. There was not a colony in which the popular governor, after 1776, was the legitimate successor of the prior royal or provincial governor; there was not a colony whose legislature was elected in accordance with colonial precedent; and, what is still more important, the Continental Congress was called into being, not by the king, nor by the English Parliament, but in direct defiance of both parliament and king. Nor, even assuming that the Continental Congress, or the colonies it represented, instituted a new system, could the new government of the United States be regarded as the legitimate successor of such system. The articles of confederation required the unanimous assent of the states to organic changes; the constitutional convention provided that "the ratification of the convention of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same." Rhode Island and North Carolina withheld for some time their ratification; yet the new government went into operation, although its institution, as far as concerns the Continental Congress, was revolutionary.[1] Revolution, however, is not, as we have seen, to

[1] "In fact the constitution was ratified by conventions of delegates chosen by the people in eleven of the states before the new government was organized under it; and the remaining two, North Carolina and Rhode Island, by their refusal to accept, and by the action of the others in proceeding separately, were excluded altogether from that national jurisdiction which before had embraced them. This exclusion was not warranted by anything contained in the Articles of Confederation, which purported to be articles of 'perpetual union;' and the action of the eleven states in making the radical revision of the constitution, and excluding their associates for refusal to assent, *was really revolutionary in character, and only to be defended on the same ground of necessity on which all revolutionary action is justified, and which in this case was the absolute need, fully demonstrated by experience, of a more efficient general government.*" Cooley, Const. Lim., 4th ed., 8.

In the sense above given may be explained Mr. Webster's remark on the Foot resolutions: "It is the people's constitution; the people's government; made for the people, made by the people, and answerable to the people."

be regarded as convertible with the *plebiscite* system which was introduced into France by Napoleon III., or with the electoral system of England. In France the emperor took upon himself to obtain what was called popular assent by an appeal to a general vote of the people. In England a prime minister, himself the nominee of the house of commons, may at any moment spring a dissolution on the constituencies, and, by a bare majority thus obtained in the house of commons, compel the assent of the house of lords and sovereign to changes which, like Lord Grey's reform bill, tear up the organic foundation of the constitution. The government of the United States is not revolutionary in this sense. It is the child of revolution, yet not the propagator of revolutions as ordinary modes by which public institutions are to be remodelled. With us the processes of amendment presented by our constitution are slow and cumbrous; legislation destroying private rights is prohibited; no legislation can take place without the assent of president, senate, and house of representatives, each with a distinct constituency, while the judiciary is ultimately to determine whether such legislation is constitutional. The British constitution, on the other hand, may be changed by a vote of the house of commons, the result of a dissolution forced at some period of high public tension, and this action neither sovereign nor house of lords can for any length of time withstand, and no supreme court of judicature can reject as unconstitutional. As contrasted with the British constitutional system our system is complex and conservative; as contrasted with our system the British is radical, rude, and spasmodic. Our system puts the majority of electors under so many checks by marshalling the law-makers in several distinct compartments, the consent of every one of which, at distinct intervals, is necessary to action, that the minority, if it has reason on its side, is able to withstand sudden impulses and panics, and ultimately to prevail. The English system puts everything under the feet of the majority of the electors at any time when the prime minister may compel the appeal to be made. The perhaps excessive conservatism of our system is qualified by its recognition of popular revolution as the basis on which government may rest; a recognition which English

tories, at least, have always refused to give. But revolution with us is a remedy far more grave, majestic, and stately in its processes than it has been held to be in England by those who have appealed to it as a determining force. It is not with us a sudden, imperfectly considered overthrow of an established system by what may be a bare majority. It must be, to be regarded as a right, conditioned on the existence of great evils which can in no other way be corrected, on a reasonable prospect of success, and on the mature convictions of the body of the people resting on the probability that the change will be a a great public benefit.[1] When these conditions are fulfilled, not only is a revolution justifiable, but a revolutionary title is likely to be of all others the most permanent.[2]

In respect to changes of state constitutions, the people of the state are the supreme arbiters.

§ 369. An interesting question, cognate to that just stated, arises under state constitutions which prescribe that amendments may be made to them by successive legislative acts to be sustained by a popular vote. Would a constitution sanctioned by the people, after adoption by a constitutional convention which has been called by the legislature, supersede the prior constitution? On the one side it has been argued that here the maxim *expressio unius est exclusio alterius* applies; and that this is the case when the constitution prescribes certain modes for the adoption and verification of laws. But however this may be, the better opinion is that when under a constitution which provides for its own amendment by legislation and consequent popular action, the legislature calls a convention, the constitution adopted by such convention and ratified by the people becomes the supreme law of the state. It is a resumption of sovereign power by the people which cannot be precluded by a pre-existing constitutional designation of some other method.[3]

[1] See to this effect Woolsey's Polit. Science, i. 402, adopted by Cooley, Const. Law, 26.

[2] See Macaulay's argument to this effect, 2 History of England, 417.

[3] The contrary view was expressed in an opinion given in 1883 by the supreme court of Rhode Island in answer to questions put by the legislature. The view of the text is sustained in an able argument by Mr. Bradly, formerly chief justice of the state, published in the Providence Journal of May 31, 1883. From that paper the following is extracted:—

"When changes became necessary

Constitution not a league.

§ 370. It was frequently asserted by Mr. Calhoun and other leaders of the states-rights school that the constitution is a compact; and that the constitution

in the constitutions of the states which attempted to secede, congress provided that the antebellum constitutions should be changed through the medium of conventions, and not according to the method provided in them for amendment through the legislature. That could as easily have been adopted as the other. It never seems to have occurred to these jurists and statesmen that any other mode than that provided in the constitution to be changed would be unconstitutional and void upon the principles of American constitutional law. The states of Alabama, Arkansas, Georgia, Louisiana, Mississippi, Tennessee, and Texas had in their constitutions preceding the war the same provisions for amendment that we have in Rhode Island, without any provisions for a convention. And the proper method of change under them was deemed in congress and in those states to be by convention, and not by legislative amendment.

"Indeed, 'the current of law precedent and practice' has been running deeper and broader since Mr. Webster's time, and, though individuals, jurists, and laymen may have dissented, it is believed that no official body has denied his doctrine except in our state.

"We may be pardoned for quoting Webster upon what is the vital question, whether the power over our forms of government is in the government or people. In his reply to Mr. Calhoun, in 1833, he said: 'The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America; her governments are all limited. In Europe, sovereignty is of feudal origin and imports no more than the state of the sovereign. It comprises his rights, duties, exemptions, prerogatives, and powers. But with us all power is with the people. They alone are sovereign, and they erect what governments they please and confer upon them such powers as they please. None of these governments are sovereign in the European sense of the word, all being restrained by written constitutions.'

"It has been said by a court in rendering judgment in a state whose constitution is in this regard the same as our own (Wood's App., 75 Penn. St. 59): 'The question whether the calling of a constitutional convention was a legal exercise of power by the legislature should now be considered by all judicial tribunals as settled so firmly as a part of the common law of our government that any attempt to disturb it would savor more of revolution than legitimacy.'"

To the same effect are cited Wells v. Bain, 75 Penn. St. 39, and Collier v. Ferguson, 24 Ala. 108; as well as the action of several of the states (*e. g.*, New York and Massachusetts) in adopting this mode of constitutional revision. That a government cannot make itself perpetual, see *supra*, § 27.

"Of the old thirteen states, the constitutions, with but one exception, contained no provision for their own amendment. . . . Yet there is hardly one that has not altered its constitution, and it has been done by conventions called by the legislature as an ordinary exercise of legislative power." Mr. Webster's speech on the Rhode Island government, Webster's Works, 227.

is not a compact is the title of one of the most effective speeches of Mr. Webster in the states-rights controversy. "Compact," in the sense in which it was thus introduced, is used by both of these great expositors as convertible with league; yet it is hard to see how the word acquired this meaning. Undoubtedly, "compact" means often a contract, but it implies something more than a merely contractual relation. St. Paul tells us of "the whole body fitly joined together and compacted," when he desires to express a perfect fusion;[1] Macaulay describes marriage as an "indissoluble compact;" while by most old writers a compact is used in the sense of the agglomeration of parts in a mass. But be this as it may, we must, for the purposes of the present discussion, accept the meaning given to this term by those who applied it in the earlier stages of our government, and, holding that by compact they meant "league," inquire which party was in the right in this contention. The inquiry is not unnecessary, since, as we shall hereafter see, the era of civil war, while it brought out more conspicuously the equipoises of the constitution, did not change their adjustments.[2] It remains, therefore, essential to consider the reasons which, independently of the arbitrament of battle, lead us to conclude that the constitution is not a league. These reasons are as follows:—

(1) A league is either for a fixed period or it is impliedly reserved to either party at any time to throw up its obligation. The constitution is expressed to be "perpetual," and there is nothing in its terms which indicates that any one state could leave it at pleasure.

(2) A league binds the parties to do a particular thing; a constitution establishes a government to which both parties are compelled to bow.

(3) A league is a contract which binds to a particular relation; a constitution is an institution in which all relations merge.

(4) Leagues can be amended by the votes of their members without any formality; the constitution of the United States can only be amended by a vote of two-thirds of congress,

[1] Eph. iv. 26.

[2] *Infra*, § 576.

ratified by three-fourths of the states, or by a convention called by two-thirds of the states, in which case the amendments must be ratified by three-fourths of the states.

(5) A league is a voluntary contract; the constitution of the United States is a "union ordained and established."

(6) The terms of the preamble recite the formation of a permanent institution and contain none of the technical expressions which are common as terms of art in leagues. The preamble, in full, is as follows: "We, the people of the United States, *in order to form a more perfect union*, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." It would have been easy, had the framers of the preamble desired it, to have introduced terms which would have indicated a confederation as distinguished from a union. This was subsequently done by the framers of the constitution of the Confederate States. The preamble to that document is as follows: "We, the people of the Confederate States, *each state acting in its sovereign and independent character*, in order to form a *permanent federal government*, . . do ordain and establish this constitution for the Confederate States of America." This is apt language to describe a league as distinguished from a union. The substitution by the Confederate convention of these terms for those in the old preamble shows that the members of the last-named body felt that a material change was necessary to make the preamble express the conception of a confederation as distinguished from a union. The inference from this very change is that the constitution of the United States, founded on revolution, was to continue in force until set aside by revolution. It was not to be a league to be forcibly dissolved when any of its members desired to leave. It was the creation of the people of the country, acting as such in exercise of their high prerogative as a nation.[1]

[1] See *supra*, § 19.

The inadequacy of the articles of confederation was exhibited both during and after the war. At one time this inadequacy was confessed by the conferring of temporary dictatorial powers on General Washington; nor even at periods of the greatest danger,

§ 371. The preamble declares: "We, the people of the United States, do ordain and establish this constitution for the United States of America." It is, as we shall hereafter see more fully,[1] the imposition by the people of the United States of a government on themselves. It is the instinctive utterance of the people, inspired by the needs and conscience of the people; it is the people stating what their government is and is to be.[2] The preamble looks to a final and irrevocable settlement. The states, through their legislatures, are not called upon to perfect the settlement. It is to the people of the states that the appeal is made. No one knew better than those to whom the

Constitution was adopted by the people of the states.

uld the states be forced to supply eir quotas to the national treasury id armament. The defects in the nfederation were vital. (1) There as no executive. (2) There was no idiciary vested with the power of dermining the constitutionality of laws deral or state. (3) Congress consisted a single house, whose members were ected by the states, the states having ual votes, and there being no popular presentation. (4) Congress had not ie power of forcing the states to comly with its requisitions. Hence the ilure of one state to contribute its quota as the excuse for the failure of another ate, until, when peace came, it was ccompanied by national insolvency nd general public prostration. The rmy was disbanded; public credit was estroyed; the outposts towards the orth and west were unprotected even om Indians, while there was no navy guard the Atlantic coast; a serious evolt had for a while defied the civil uthorities in Massachusetts, and in ther states similar disturbances were hreatened; there was no government apable of negotiating with foreign owers or of maintaining order at home.

In Bayard on the Constitution, already cited, and of which the second edition was published in 1834, the argument is thus forcibly stated (pp. 162 *et seq.*): "There is no provision in the constitution for the dissolution of the union, or the withdrawal of any one of the states from the confederacy. Such an event was evidently not contemplated and cannot take place constitutionally . . . Were the constitution merely a *compact* between the states, no *one* of the parties would have a right to withdraw from it . . . But, as has been said, the constitution is not a mere compact, but a government, over which the states have no rightful control." Mr. Bayard is well known as occupying for years a leading position on the democratic side of the senate of the United States, and as a supporter of General Jackson's administration. The views thus expressed are the same as those taken by General Jackson in the nullification controversy. The same view was taken by Mr. Madison in reply to Mr. Pickering's position that the purchase of Louisiana dissolved the union, that being a mere league of designated states.

[1] *Infra*, § 376; and see *supra*, § 19.

[2] *Supra*, § 19. See speech of Patrick Henry, 3 Elliot's Debates, 23.

framing of the constitution was entrusted, that if a state is to be addressed as such, this must be through its official representatives. The reason why the states were not so addressed was because the appeal was from a power above the states. It was the final appeal of the Revolution; it overlooked the legislatures of the states, and addressed the people of the states. The states did not, in the due process of formal legislation, frame the new government; the people of the states were united in a tie which only revolution could sever.[1]

The constitution confirms sovereignty in the states.

§ 372. While, however, the constitution of the United States was revolutionary, not deriving its force from the legislatures of the states as such, the system it contained confirmed the states as, within a specific range, sovereigns. There were two reasons for this. In the first place, it was important that the old state limits should be preserved, since these limits not only had many strong historical associations, but were often, as we have seen, the lines of demarcation between populations with very different social conditions and political habits. In the second place the commitment of local affairs to local governments, one of the essential conditions of a liberal civilization,[2] could be in no way so effectually worked as by the placing of local government in the hands of the states, nor could this be done without making the states sovereign in all matters which a sound policy required to be specifically committed to them. The care which the constitutional convention, in this process of reconstruction, took to re-establish the states, is exhibited through the whole document. The apportionment of representatives and of direct taxes is by states. The senate is to be composed of two senators from each state; in the case of the election of president being thrown into the house, the states have each a single vote irrespective of the number of members; the states vote for their representatives in the electoral college in a block. By amendments which were adopted soon after the ratification of the constitution, as part of the general understanding attending such ratification (Amendments IX. and X.),

[1] *Supra*, § 19.

[2] *Supra*, § 363.

"the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people;" and "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The constitution in all its provisions looks to "an indestructible union composed of indestructible states."[1] The constitution, a revolutionary settlement, put side by side these indestructible sovereignties. Of the states now forming part of the union two-thirds were not in existence when the constitution was framed, but the new states have the same attributes of sovereignty as the old. The original thirteen states, though not created by the constitution, were remoulded by it, and endowed with a new range of powers which, owing to the imperial position of the union as such, gave them prerogatives far higher and more commanding than that which they previously possessed. But though the United States government and the states are in this sense alike creatures of the constitution, they are equally indestructible. The constitution makes them equally essential to the political structure it establishes. If the states were destroyed the United States would cease to exist. If the United States should be destroyed the states which derive their existing type and security from it would be plunged into destructive contests with each other.[2]

[1] Texas *v.* White, 7 Wall. 700.

[2] Mr. Webster says, in his letter to the Barings (6 Webst. Works, 537): "Every state is an independent, sovereign, political community, except in so far as certain powers, which it might otherwise have exercised, have been conferred on a general government, established under a written constitution, and exercising its authority over the people of all the states. This general government is a limited government. Its powers are specific and enumerated. All powers not conferred on it still remain with the states or with the people. The state legislatures, on the other hand, possess all usual and ordinary powers of government, subject to any limitations which may be imposed by their own constitutions, and with the exception, as I have said, of the operation on those powers of the constitution of the United States."

Mr. Hamilton, in the Federalist, thus writes: "An entire consolidation of the states into one complete national sovereignty would imply an entire subordination of the parts, and whatever power might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of

§ 373. It might be said that the effect of the late civil war, and of the consequent amendments,[1] has been to rearrange the relations of the states to the United States, making the government of the United States virtually absolute, and stripping the states of sovereignty. This, however, has not been the case. In the adoption of these very amendments the states were appealed to as arbiters with as much solemnity as was the case when the first amendments were proposed; and, though the assent of the southern states may have been more or less ex-

Recent amendments to the constitution strengthen this view.

sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."

And Mr. Madison, in the same work: "The state governments will have the advantage of the Federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of the other."

See Trade Mark Cases, 100 U. S. 82, and other cases cited, *infra*, § 426.

As to the doctrine of "state-lapse," and "state-suicide," see *infra*, § 374.

"No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people in one common mass." . . . "The powers of sovereignty are divided between the government of the Union and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." Marshall, C. J., McCullough *v.* Maryland, 9 Wh. 316.

"The very highest duty of the states, when they entered into the union under the constitution, was to protect all persons within their boundaries in the enjoyment of those inalienable rights with which they were endowed by their Creator. Sovereignty for this purpose rests alone with the states." Waite, C. J., U. S. *v.* Cruikshank, 92 U. S. 542.

Mr. Wm. Rawle, the elder, was district attorney in Philadelphia during Washington's administration, and was known as a federalist as well as a legal adviser of the two first presidents. In Mr. Rawle's work on the constitution (2d ed., 1825), p. 27, we have the following: "Every state must be viewed as entirely sovereign in all points not transferred by the people who compose it to the government of the Union; and every exposition that may be given to the constitution, inconsistent with this principle, must be unsound."

"The political society which, in 1796, became a state of the Union, by the name of the State of Tennessee, is the same which is now represented as one of those states in the congress of the United States. Not only is it the same body politic now, but it has always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a State of Tennessee, and the same State of Tennessee." Miller, J., Keith *v.* Clark, 97 U. S. 461.

[1] See *infra*, §§ 584 *et seq.*, § 595.

acted by the exigencies of war, yet their formal approval as states was given, and behind this approval we cannot go.[1] But the amendments themselves, in prohibiting the states from adopting any legislation depriving the negro race of civil rights, and forbidding state assumption of insurgent debts, no more destroy state sovereignty in other matters than does the prior analogous clause, prohibiting the states from passing laws impairing the obligation of contracts, destroy state sovereignty. So far from this being the case, each additional exception is an affirmation of the obligatoriness of the rule to which the exception is made. So, indeed, has it been declared by the supreme court of the United States.[2] And, in fact, the resort to constitutional amendments to effect this special end shows that the residuum of municipal sovereignty is in the states. Had such sovereignty existed in the Federal government, congress could have assumed the needed powers without a constitutional amendment.[3] It is true that the reconstruction amendments, as they are called, limit the supreme authority of the states, not merely in the delegation to the Federal government of the right to supervise, through the supreme court, all state legislation discriminating between races, but in making inoperative all state legislation denying to any person the equal protection of the laws, or depriving any person of life, liberty, or property without due process of law. But it must be remembered that neither of these limitations gives any additional power to the Federal government. They simply check state legislation for the benefit of the people of

[1] *Infra*, § 593.

[2] *Infra*, § 586.

[3] See, on the topic in the text, an article by Mr. D. D. Field, in the North American Review for May, 1881, p. 407, and by Senator Edmonds, in the same periodical for October, 1881, p. 339. As to reconstruction, see *infra*, § 589.

"The assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred on congress to enforce the prohibition, this gives congress power to legislate generally on the subject . . . is certainly unsound. It is repugnant to the 10th amendment of the constitution, which declares that powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or the people." Bradley, J., U. S. *v.* Stanly *et al.* (civil rights cases), Sup. Ct. U. S. 1883. *Infra*, §§ 591 *et seq.*

the states. Their effect, as we shall have hereafter occasion to see more fully,[1] is to restore in a large measure, to the people of the states, the function of governing themselves in matters which belong more properly to private enterprise than to legislative action.

"Nation" more properly applicable to the people of the United States as a body; "State" to the particular states; "Sovereignty" is not necessarily absolute.

§ 374. Many of the difficulties which have been encountered in the construction of the constitution have arisen from the varied means in which the words "Nation," "State," and "Sovereign," are employed. "Nation" was by colonial usage applied to nomadic Indian tribes; in the old regime of personal law it was applied to distinct races dwelling together in the same territory; even now the Jewish "nation" and the Sclavonic "nations" are not popularly regarded as conditioned by territory. In the following pages, however, the term "nation" is regarded as applying to the people of the United States, and the term "national" as appertaining to the Federal government. There is, in this view of the term, but one "nation" with us, though, as we shall see, there is a number of "states."[2] We have but one national government, which is the government of the United States; but one national flag, the flag of the United States; but one national citizenship, the citizenship of the United States. "State" is also a term beset with ambiguities. In its primary political sense it means the body politic sovereign within a specific territory. Thus we have the "state" of Venice referred to as convertible with the Venetian sovereignty; while the term "states" of Europe is used to denote the several European sovereignties, and "foreign states" to denote all countries except the one to which we particularly belong. In the following pages "state" is used to designate one of the particular states of our Union. "Sovereignty," also, is a term the misuse of which has been productive of many fallacies. "Sovereign" is the governing power of a state, and "sovereignty" is supremacy, but there is no human sovereignty that is actually supreme. Despotism

[1] See *infra*, §§ 588, 594.

[2] See this distinction discussed in Whart. Conf. of Laws, §§ 8, 33.

in Russia, it has been said, is tempered by assassination, and there is no sovereign, no matter how mighty, who does not feel himself bound, on taking any unusual step involving his relations to other sovereigns, to appeal by diplomatic notes or by proclamations to the judgment of such sovereigns in justification of his course. The law of nations, though there is no international tribunal to enforce its rules, is nevertheless so far supreme over nations that if any nation flagrantly violates those rules, justice will sooner or later be inflicted on it, almost as certainly as justice is inflicted on offenders by municipal laws.[1] Sovereignty, therefore, in even its highest forms is more or less qualified; and this becomes more and more the case as, in the progress of civilization, the successive stages of local government are more or less perfected. There is sovereignty in the father of a family with which, within a certain range, neither national nor state government interferes. There is, in a larger range, sovereignty in a municipality; in a still larger range, there is sovereignty in a state; within the specific sphere committed to it, there is sovereignty in the national government. But in no one of these cases is the sovereignty absolute. As sovereignty is in all cases qualified, there is no such thing as perfect sovereignty colliding with perfect sovereignty. This is eminently the case with the United States. There is a sovereignty of the Federal government, and a sovereignty of the states; but these sovereignties, though occupying a common territory, move in harmony as correlative parts of the same system.[2]

[1] *Supra*, §§ 26, 123.

[2] See *supra*, § 363.

In a work entitled "The Theory of our National Existence as shown by the Actions of the Government of the United States since 1861," by John C. Hurd, LL.D., published in Boston in 1881, there is a detailed discussion of the rulings of the supreme court of the United States, on the subject of the civil war and of reconstruction. His contention is that by that court two positions, not easily reconciled, are maintained: one that the "Confederate States" were never out of the Union, the ordinances of secession being void; the other, that such states were to be regarded, during the civil war, as belligerent powers at war with the United States. Dr. Hurd rejects both the "national" theory, that the sovereignty of the country is in its people as an aggregate, and the "states-right" view that it is in the states as permanent bodies, going so far as to dispute even the modified states-rights theory held by Chief Justice Chase, that the states, like the general government, are, from

§ 375. It is plain that the privileges and restrictions assigned by the constitution to states, do not apply to territories. Territories are mere dependencies, under the general control of congress, which control, however, from the nature of things, cannot be so extended as to give the territories the distinctive rights which are assigned under the constitution exclusively to

Territories not included under the term "States."

the nature of things, indestructible. His conclusion is, that the states are sovereign jointly as long as they remain in the union, but that out of the union they are not sovereign. "The states in union held sovereignty as a unit. Sovereignty in the American republic was not *popular sovereignty*—the sovereignty of so many millions of human beings. The political people, organized as the people of the states, held it, and might be described as a *democratic oligarchy*. . . . The political people of the several states in union instituted the general government, under the constitution as law, to be the means for exercising their sovereignty over the people considered as a mass of inhabitants without reference to state boundaries. And, negatively, the people of the United States, considered as a mass of inhabitants, without reference to state boundaries, did not institute the general government, under the constitution, as law, to be the means for exercising their sovereignty over the political people of the several states," pp. 140–1. "These ordinances (of secession) were efficacious in leaving sovereignty, an undiminished unit, exclusively in the states continuously holding it by the fact of their voluntarily continuing in union; the territory and population of the refusing (non-seceding) states remaining under the same sovereignty as before, *but thereupon vested only in the states continuing in the voluntarily* existing union." Ibid. p. 145. The alternative views are afterwards, at the close of the work (p. 530), thus stated: "That of the supremacy, in union, of the states voluntarily remaining united (including the doctrine of possible state-lapse), of which states in union, the government organized under the constitution is only the agent; or, that of the supremacy of a number of persons composing a 'national' government, to whom the states are sub-ordinate, and on whom they constantly depend for the continued exercise of the powers 'reserved' to them, as expressed in the language of the constitution."

It is impossible, in the brief space allowable for this note, to examine the reasons given by Dr. Hurd in support of the conclusions above stated. He certainly succeeds in showing that the supreme court, in its opinions on the reconstruction question, oscillates between two positions which are superficially contradictory, that the "seceded" states remained in the United States, and that they were belligerent enemies of the United States. (See *infra*, p 593.) But, however difficult it may be to reconcile these propositions, there are equal difficulties, as is shown by Lord Macaulay, in reconciling the propositions on which rested the action of the convention parliament of 1688, in "reconstructing" England under William III. Nor does it follow that, because the southern armies were recognized as belligerents, this involved a recognition of the seceding governments of the southern states. As to reconstruction, see, *infra*, § 593.

states. Whether congress has absolute control of the territories has been much discussed.[1] On the one side it has been shown that there is no limitation in the constitution bearing on the territories specifically.[2] On the other side, it is ruled that congress holds the territories in trust for the whole Union. As a matter of fact, the territories are placed by usage under a uniform system of government by which they have their own judiciary, and their own legislatures in whom is vested the power of local taxation. As a guarantee, also, to the territories, insuring them the right to make their grievances known, each territory is entitled to a delegate who has a seat on the floor of the house of representatives, though not a vote. But, independently of this particular distribution of power, the safeguards of liberty which the constitution, as will be hereafter more fully seen, gives to citizens generally, must be regarded as extended to citizens residing in territories.[3]

§ 376. Although the residuum of sovereignty is given by the constitution to the states, the general government, in the exercise of the functions committed to it, is supreme, subject to the limitations imposed by the constitution. This is expressly prescribed by the sixth article of the constitution. "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding."[4]

In the exercise of the powers given to it general government is supreme, subject to restrictions of constitution.

§ 377. It may seem a comparatively little matter, when power is distributed by a constitution between two distinct sets of depositaries, if some portion of this power is shifted from the one to the other. It may be said, for instance, "here is a particular power

Importance of preserving constitutional demarcations.

[1] See *infra*, §§ 461 *et seq.*

[2] Am. Ins. Co. *v.* Canter, 1 Pet. 511.

[3] See *infra*, §§ 463–4, 588.

[4] See Dodge *v.* Woolsey, 18 How. 331; White *v.* Hart, 13 Wall. 646; Slaughter-House Cases, 16 Wall. 36; United States *v.* Cruikshank, 92 U. S. 542; and cases cited *infra*, §§ 594 *et seq.* As to incidental powers, see *infra*, § 468.

which, by the letter of the constitution, is reserved to the states; why not let it be absorbed by the general government?" Or it may be said, "this power is given to the general government, why should it not be transferred to the states?" Now, it might be a sufficient answer to this, that the distribution being made by the constitution can only be readjusted by a constitutional amendment. But it is important to go beyond this, and, in order fully to understand the line of demarcation, to consider the reasons on which it is based. These reasons may be arranged as follows: So far as concerns the enumerated powers given to the general government, it is necessary that the general government should be supreme. Were it not so we would be subjected to the turmoil, waste, and paralysis attending dual sovereignties. Nor is the basis of demarcation arbitrary. The powers given to the general government appertain to matters in which it is proper the general government should be supreme. If war is to be levied, it should be levied with all the military forces of the entire Union, and no state should be allowed to withhold its support or interfere in the management of the campaigns. If a peace is to be negotiated; if money is to be borrowed on the national credit; if a tariff is to be laid; if money is to be coined and issued; if a post-office is to be established; if patents and copyrights are to be granted; if a national system of bankruptcy is to be put in force, such functions should be exercised by the general government exclusively. The same exclusiveness is, from the nature of things, given to the general government in respect to the raising and management of army and navy; the regulation of commerce with foreign nations and between the states; the establishment of Federal courts; the settlement of terms of naturalization; the control of territories, of such particular districts as are ceded to the United States for the purposes of the government, and of land ceded for navy-yards and forts. In the exercise of these powers, specifically given to the general government, that government should not only be supreme, but must determine the limits of its sovereignty. In no other way can the evils of dual government be avoided. On the other hand, there are reasons of transcendent importance why the residuum of sovereignty should remain, where

the constitution places it, in the hands of either the states or the people, as the case may be; that which from the nature of things belongs to the states remaining with the states, that which from the nature of things belongs to the people remaining with the people. These reasons are as follows:—

(1) Government should not undertake to do what may be as well done by the voluntary action of the people.[1] A large city, for instance, to recur to an illustration already given, has to be supplied with milk, with bread, with coal. It might be possible for government to take the supply in hand, and direct who shall deliver these commodities, and in what quantities they are to be left at each house. But even were this practical, the adjustment never could be so perfect nor the supply so adequate as when adjustment and supply are left to private enterprise. Another illustration may be found in the management of families. It might be possible for the state to take the parent's place in the management of children, yet not only are children far better trained by parents than by states, but by the substitution in such management of the state for the parent the sources of the purest earthly happiness would be dried up, and the foundations of society shattered. When the eleventh amendment says that the "powers not delegated to the United States by the constitution, nor prohibited by it to the states are reserved to the states respectively or to the people," we must regard it as expressly protecting by its last clause, not merely the rights of the states as distinguished from those of the general government, but the rights of the people as distinguished from those of the states.[2]

(2) Without local government the interests of territories differing in character cannot be properly cared for.[3] Had local governments, such as now exist in each of our states, been granted from the outset by England to Ireland, England would have been spared three great calamities. It would have been spared the bitter animosities which centuries of class legislation engendered in Ireland. It would have been spared the necessity of now adopting statutes, like

[1] See *supra*, §§ 22, 365; *infra*, §§ 588, 595.

[2] See, as to limits in this respect, *supra*, §§ 27, 53, 365; *infra*, § 595.

[3] See *supra*, § 363; *infra*, § 595.

the land bill, whose radical interferences with freedom of contract produce a general sense of insecurity. It would have been spared the assumption by Ireland of the casting vote in the house of commons when English parties are equally balanced. With us there are diversities of character and soil and local traditions as great as those between England and Ireland. In Louisiana the basis of population is French, and the established jurisprudence is that of Rome; while, though the rest of the states purport to hold to the English system, in some the common law is declared not to be in force, in others it is in force in almost its pristine vigor, in others it has been more or less completely superseded by a code. In some states there is a large negro population, swayed by the traditions of slavery and of the civil war, in which this population was emancipated; in others this population is insignificant in numbers, and has been subjected of recent years to no such momentous change. In some states compulsory education is in force; in others it would not be tolerated. In some states foreigners are entitled to vote on a few months' residence; in others they cannot vote until naturalized. In some states title to unoccupied land is given to squatters; in others no such grants are possible.[1] If we take up a return of the legislation of any one of our states, we will find two-thirds of it to consist of statutes important for the furtherance of local interest, but which a general imperial legislature, such as congress, would not have had time to consider.

(3) Unification, in a country combining states with varied jurisprudences and territorial capacities, may destroy rather than promote union. Union implies continuing diversity of states bound together for particular purposes, but for other purposes independent; and a forced unification of such states would result in the obliteration of those state characteristics by the interlocking and dovetailing of which a strong government is best constituted. It is hard to see how an empire like the United States could be kept together if centralized, each section, unprotected by its distinctive laws, being in turn subject to whatever a majority of the whole nation might

[1] See, as to municipal differences, *supra*, § 363.

prescribe. Only by the maintenance of diversity within its range can union be made perpetual.[1]

(4) By local governments alone, having control of all matters not necessarily belonging to the general government, or to the people, can the general government be relieved from the pressure of business by which it would otherwise be oppressed. Had there been an adequate local legislature in Ireland, the English Parliament would not be the scene of obstructions by which its efficiency is almost destroyed, and a ministry with the largest majority known for years rendered helpless.

(5) The patronage under the control of the general government is even now a dangerous source of corruption, and it certainly puts a great strain on our institutions. It is not likely that these institutions could bear the strain of a patronage which would not only be treble what exists at present, but would be vested in chiefs who, from the remoteness of the object controlled, would in many cases be able to defy investigation.

§ 378. The supreme court of the United States has held that, though the constitution of the United States imposes on a governor of a state the duty of surrendering a fugitive from justice on due demand being made, neither the governor nor the state can be coerced by writ to make the surrender.[2] A similar distinction has been taken in respect to the clause prohibiting the passage of state laws impairing the obligation of contracts. No one pretends that a state can be enjoined from passing such a law. What is decided, and all

Coercion of state and maintenance of federal authority not convertible.

[1] Mr. Webster, in his second speech on Foot's resolution, exhibits with great felicity this correlation of diversity and unity. "I claim them," he says, speaking of eminent South Carolina statesmen, "for countrymen, one and all, the Laurenses, the Rutledges, the Pinckneys, the Sumpters, the Marions, Americans all, whose fame is no more to be hemmed in by state lines, than their talents and patriotism were capable of being circumscribed within the same narrow limits." Yet while there was one nationality, there was a series of states, independent each within its range, among which were Massachusetts and South Carolina. They are personified as heroes, forming distinct personalities, while Washington, representing the supreme hero of nationality, also a distinct personality, depends on them, separate yet united, for the maintenance of their common liberties. "Shoulder by shoulder they went through the Revolution, hand in hand they stood round the administration of Washington, and felt his own great arm lean on them for support."

[2] Kentucky *v.* Dennison, 24 How. 66; *infra*, § 547.

that is decided, is that all such laws when passed are invalid.[1] So it is as to laws impairing civil rights;[2] and so it is with regard to secession. A state could not be enjoined from passing an ordinance of secession. But such an ordinance, if passed, would be invalid.[3] It is true that it has been said that to maintain by force in a particular state Federal authority is virtually to coerce such state. In one sense this is true, since Federal authority, if resisted, can be maintained in such a way as to exact obedience even if the whole state were engaged in the resistance. This might be in any one of the following ways: (1) Payment of debts due the Federal government for customs or other dues may be compelled by military force, if the civil authority is not sufficiently strong for the purpose. (2) Litigation in conflict with Federal supremacy may be removed to the Federal courts. (3) State legislation, whether through constitutional conventions or legislatures, may be declared unconstitutional by the Federal courts, and any action under such legislation suppressed by the whole force of the Federal government. (4) The same force may be used, as it was by President Washington in the whiskey insurrection, to protect the due service of writs. (5) Parties engaged in treasonable conspiracies against the United States can be arrested and tried for treason, even though their treason should consist in disaffected legislative action; and by a repeal of the *habeas corpus* act, under the authority of congress, such parties may be constitutionally imprisoned until, danger being over, the free action of the writ should be restored. There is no point, in fine, as to which the authority of the Federal constitution, in all matters within the range of that authority, cannot be enforced without in any way breaking into the independent authority of the states as secured by the constitution; and if the enforcing obedience from the citizens of a state, within such range, is to be regarded as coercion of a state, then coercion of a state is within the powers of the Federal government as given by the constitution. But there is another sense in which coercion of

[1] *Infra*, §§ 477 *et seq.*

[2] *Infra*, § 586.

[3] See Texas v. White, 7 Wall. 700.

a state is entirely outside of the range of the Federal government. The states, under the constitution, are not distinct personalities capable of being sued. Even when a positive duty, as was the case in reference to the delivery of fugitives for labor, and is still the case in reference to fugitives from justice, is imposed upon a state executive, he cannot, as we have seen, be compelled by Federal force, so it has been decided by the supreme court by a unanimous vote, to perform such duty.[1] It is possible, indeed, to wage war against a foreign state; but for the Federal government to wage war against a state in the Union as a foreign state would be to acknowledge such state as foreign; and, in the late civil war, to acknowledge one of the southern states as foreign would have been to have acknowledged the validity of its secession. The reconstruction constitutional amendments expressly repudiated this assumption. These amendments were adopted by the votes of the states which had taken part in the insurrection. Their independent sovereignty, so has it been since then repeatedly held, has been never extinguished, though their relations to the Federal government were temporarily suspended. If "coercion of a state" implies the right, as it would were we speaking of a foreign power, to conquer such a state and reduce it to a dependency, then the southern states, so it might have been argued, bore to the United States, after the war, the relation of Poland to Russia. Such a charge, however, would not only have imposed on the Federal government a burden of responsibility and of discontent under which it might have been crushed, but would have been in antagonism to the fundamental covenants of the Federal constitution. That constitution, to repeat once more the words of Chief Justice Chase, established "an indestructible union of indestructible states."[2]

§ 379. From the fact that the residuum of sovereignty is deposited by the constitution in the states, while the specific grants of power made by it are given to the general government, it follows that the limitations

Limitations in constitution apply

[1] Kentucky v. Dennison, 24 How. 66. Buchanan, ii. 315; and letter of Mr. Curtis in Philadelphia Times of Sept. 1, 1883.

[2] See *infra*, § 593; Keith v. Clark, 97 U. S. 461; and see Curtis's Life of

to general government unless expressly applied to the states.

imposed by the constitution are limitations on the general government and not limitations on the states unless otherwise provided. In other words, the constitution says to the general government, "you are to have certain powers, in respect to which you are to be absolute, subject to certain restrictions, while all the remaining powers of government are given to the states." It is true that the states are put under restraints, but for such restraints to operate, the states must be specifically named. Unless they are named, the limitations only apply to the general government.[1]

Necessity does not abrogate constitutional limitations but varying conditions unfold them.

§ 380. How far necessity is a defence for an unlawful act is elsewhere noticed;[2] and it will be seen that when either an individual or a nation can only be extricated from some enormous evil by violent action towards another, such action is excusable. In Great Britain, there being no written constitution restricting the powers of government, the ministry for the time being, in cases in which a supposed necessity requires action not justified by law, take such action and then apply to parliament for indemnity. This course cannot be adopted in the United States, congress having no power to pass indemnity statutes, and, in cases conflicting with the constitution, having no power to condone the transgression of a constitutional limitation. Aside from this distinction, our constitution within its range is supreme. Hence necessity, no matter how urgent, will not excuse the suspension of any of its limitations by either executive or legislature; and any such suspension will be held void by the supreme court. For, independent of the fact above noticed that the constitution of the United States is not only absolute but precise, and cannot without usurpation be dispensed with, there is a material difference between necessity as an excuse for defence to a personal attack and necessity as an excuse for unconstitutional abrogation of a law. The first is a right which the law itself concedes. The second is a usurpation by which all law is annulled.

[1] Twitchell *v.* Com., 7 Wall. 321; Edwards *v.* Elliott, 21 Wall. 532; Walker *v.* Sauvinet, 92 U. S. 90.

[2] See, incidentally, *supra*, §§ 148, 178, 210.

"Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government within the constitution has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."[1] But while necessity does not abrogate constitutional limitations, their meaning, when couched in general terms, is unfolded under the action of changing conditions.[2] "The constitution," said Mr. Clay, in a speech made in 1816, "never changes; it is always the same, *but the force of circumstances and the lights of experience may evolve to the fallible persons charged with its administration* the fitness and necessity of a particular exercise of constructive power to-day, which they did not see at a former period."[3] It is true that in this way prohibitions of the constitution cannot be overleaped. No change of conditions, for instance, can operate to abrogate the provisions of the constitution prohibiting the establishing of religion; the taking of life, liberty, or property unless by "due process of law;" the deprivation of civil equality, the restriction of freedom of petition or of speech. On the other hand, the clauses conferring on the Federal government prerogatives essential to its empire, are in the nature of blank powers, to be filled up by the unconscious legislation of eras.[4] Thus the power to make treaties holds in it dormant, until the due period arrives, the power to make treaties of annexation; in the term "commerce," lies dormant not merely commercial dealings on the high seas, as was at first supposed, but commercial dealings on the great rivers forming the avenues of business between states;[5] in the term "post roads" lie dormant steamboat lines and telegraph wires.[6] There must, from the nature of the case, be in the constitution of an empire elas-

[1] Milligan, *ex parte*, 4 Wall. 2.

[2] *Supra*, §§ 19-22.

[3] See Garland's Life of Randolph, ii. 76.

[4] *Supra*, §§ 19-22; *infra*, § 596.

[5] "It is admitted," says Mr. Calhoun in his report on the Memphis Memorial in 1846 (5 Calhoun's Works, 268), "that the framers of the constitution in delegating the power, had in contemplation the Atlantic coast only." But he argues that the vast amount of interstate business on that river puts it on the same footing as the ocean.

[6] See *supra*, §§ 21 *et seq.*; *infra*, §§ 446 *et seq.*

ticity in all powers distinctively imperial; while in an empire which is a confederation of sovereign states peopled by freemen of English traditions there must be a strict maintenance of the rights of the states in all matters municipal, and an absolute guarantee of the rights of personal liberty, of security of property, and of equality in the eye of the law. Without freedom of imperial development within its orbit there would be no government fitted for the American people; without absolute guarantee of state and personal sovereignty within their orbits there would be no American people fit to be governed.[1]

[1] The importance, on the one side, of elasticity in the terms giving imperial powers, and on the other side, of rigor in the terms securing state sovereignty and individual rights is shown by the following table:—

Population of U. S. in 1790,	3,929,214
" " in 1880,	50,155,783
Receipts of U. S. in 1792,	$3,442,070
" " in 1882,	$220,410,730
Number of post-offices in 1790,	75
" " in 1882,	46,231
Miles of post-routes in 1790,	1,875
" " in 1882,	343,618
Cotton crop 1829,	870,415 bales.
" 1882,	5,435,845 bales.
Wheat, exports of 1821,	$178,314
" " 1881,	$167,698,485
Coal, production of, 1790, none for use.	
Tons produced in 1881,	76,221,934
Petroleum not exported till 1862.	
Exports in 1882,	$51,232,706
Original states in 1790,	200,000,000 acres.
States since added	1,200,000,000 acres.
Sail, 1789,	201,562 tons.
1882,	4,165,933 tons.
Railroads, miles in operation—	
In 1821,	23
In 1882,	127,830

The expansion of the country territorially is shown by the maps published in the United States census reports of 1882. A map of the country in 1780 shows the territory occupied by the states by a narrow strip of color extending along the Atlantic coast between the Allegheny mountains and the sea. This belt is lightly tinted on its interior edge, towards the mountains, as showing a thin population, and is deep in color, to show denser population, only on the immediate rim of the sea. All other parts of the country, except two or three small patches on the Ohio River, are blank and uncolored, there being no appreciable white population. In 1800 there is a thin line of color leading down the Ohio River Valley to the Mississippi, with a few little patches beyond. The coast line of population had also at some points pressed over the Alleghenies, and in upper New York and Northwest Pennsylvania had reached the lakes. When the observations were taken in 1810, it was found that there was a farther westward extension along the lakes down the Ohio and south of that stream, and at the mouth of the Mississippi, a settled population was for the first time seen. In 1820 it was found that there was an advance of population on all these lines, and connection was formed between the Louisiana settlement and those on the Ohio River. In 1830 the general westward boundary was the

§ 381. It does not follow that because a power is given to the general government it is exclusively in that government.

Mississippi, instead of the Alleghenies, as in 1790. When the observation was taken in 1840, it was found that the vacant unoccupied spaces east of the Mississippi, which even in 1830 formed nearly half of the entire area, were filled up; and the western boundary was extended four degrees west of the Mississippi. The observations of 1850 and 1860, as given in the maps, showing the condition of the country at the time of the census of those years, indicate an extension rather vertical than lateral: there are not such vast areas of new country occupied, but the deepened color of the maps speaks of thicker layers of population in the occupied tracts. In 1870 the map shows that the stream torrent of population had, as if by a freshet, surmounted, in their accessible passes, the Rocky Mountains, and had descended and collected in pools on the Pacific coasts. East of the 97th degree the whole territory, as depicted on the map for 1870, is covered with tints, showing by their depth a population of greater or less density; the only patches bare of population being the swamp glades of Louisiana and Florida, and the Adirondacks of New York. West of the 97th degree population is strung like beads along the great water-courses and mountain passes, or gathered in larger masses at the Pacific ports. In 1880, the deepening color over the whole area indicates an almost unbroken growth of population, varying, however, in density with the opportunities of local activity; while along the Pacific coasts, states of immense size are growing up. And this vast expansion of territory and increase of population have been accompanied by changes of condition which make the Union of 1880 in its characteristics essentially different from that of 1790. It is true that the English tongue is still the common tongue, and English traditions mould popular habits, temper, policy, and law. It is true that the Indians remain among us, as insoluble as ever. But the Chinese, a race equally insoluble, though in a new line, has been added, and the negro race has been moved from a position of slavery, or subordination, to one of civil equality; and its citizenship and right of suffrage have been established by law. Nor is this all. New industries have sprung up which have entirely changed the relations of the country to the rest of the world. In 1790 cotton was not exported, nor was wheat, nor was coal oil, nor were the precious metals. Now the precious metals from this country determine the balance of the currency of the countries of Europe; its coal oil lights their homes; its wheat keeps their populations from starving; its cotton supplies their clothes. It was once said that wine was the single produce with which this country could not supply Europe; yet now it seems that the vineyards of California are about to supplement the waning capacity of those of France.

It would have been impossible, if the constitution had laid down the mode in which the powers of government were to be exercised, for ligatures which would have fitted 1790 to have fitted 1880. And we must conclude that for the constitution of a system so colossal in structure and yet so expansive in its integral elements, it is essential that there should be (1) elasticity in powers distinctively imperial; (2) Maintenance of state sovereignty by

If the exercise of the power is prohibited to the states, then the power is one which the general government alone can exercise.[1] But where there is no such exclusion of state jurisdiction, and when the wrong to be remedied is one against the state as well as against the general government, then the prevalent opinion is that the wrong may be redressed by state courts. So far as concerns criminal prosecutions, the law may be thus stated:—

Powers of state and federal governments may be concurrent.

(1) Congress cannot constitutionally confer on a state court jurisdiction over offences exclusively against the Federal government. Statutes conferring such jurisdiction do not bind the state courts as such.[2]

(2) Offences which directly affect a state or its population are cognizable in the state courts, unless the exercise of such jurisdiction by the states is prohibited by the constitution.[3]

(3) When jurisdiction of an offence against Federal laws is given to the Federal courts by congress, the state courts cannot take cognizance of it unless jurisdiction be given them by act of congress.[4]

(4) An offence may be indictable in one aspect against the United States, in another against a particular state, in which case it may be prosecuted in either jurisdiction.[5]

§ 382. In matters of distinctively state procedure, the supreme court of the United States will follow the rulings of the supreme court of the particular state.[6] It has, therefore, been held that the supreme court of the United States is bound by the decisions of state supreme courts on the question whether statutes of such

State laws followed as to state procedure.

which only can be preserved that distribution of sovereignty essential to liberal imperialism; (3) Maintenance of those individual rights without which no government would be worth preservation.

[1] Sturgess v. Crowinshield, 4 Wheat. 122.

[2] *Infra*, § 524.

[3] See Whart. Cr. Law, 8th ed., §§ 256 *et seq.*, where the authorities are cited; Com. v. Barry, 116 Mass. 1. That this is the case with coining and counterfeiting, see Prigg v. Com., 16 Pet. 539; Fox v. Ohio, 5 How. U. S. 410; Com. v. Fuller, 8 Met. 313; Manly v. People, 3 Seld. 295; Buckwalter v. U. S., 11 S. & R. 193; Romp v. Com., 30 Penna. St. 475; Sutton v. State, 9 Ohio, 133; Jett v. Com., 18 Grat. 733; Waldo v. Wallace, 12 Ind. 569. See, however, *infra*, §§ 444, 524.

[4] *Infra*, §§ 444, 524.

[5] *Infra*, § 534; Whart. Crim. Pl. and Pr., § 442.

[6] *Infra*, § 526.

states have been enacted in compliance with the state constitution;[1] and so in all matters not involving Federal issues.[2] But it is otherwise in matters of substantive law.[3]

§ 383. It will be seen that treaties as well as statutes, when emanating from the general government within its constitutional orbit, are part of the supreme law of the land. When a statute and a treaty, adopted by the general government, or two successive statutes, come in collision, it is the last in date that prevails.[4] How far treaties are self-acting is considered in a future section.[5] But, unless there is a plain conflict between a statute and a treaty, neither will be construed to override the other.[6]

Treaties and statutes come in *pari passu*; and the latest prevails.

§ 384. When a statute is susceptible of two probable interpretations, by one of which it is unconstitutional, and by the other of which it is constitutional, the latter will be preferred.[7]

Presumption is in favor of constitutionality.

[1] *Infra*, § 603; Railroad Co. *v.* Georgia, 98 U. S. 359.

[2] Fairfield *v.* Gallatin, 100 U. S. 47.

[3] *Infra*, § 526.

[4] *Infra*, §§ 623 *et seq.* Foster *v.* Neilson, 2 Pet. 254; The Cherokee Tobacco, 11 Wall. 616; Taylor *v.* Morton, 2 Curt. C. C. 454; Langford *v.* U. S., 12 N. & H. 338; Baker *v.* Portland, 5 Sawyer, 566; Ropes *v.* Clinch, 8 Blatch. C. C. 304; The Clinton Bridge, 1 Woolworth, 150; In Ah Lung, *in re*, 18 Fed. Rep. 28; S. C., under name of Pong, *in re*, 17 Cent. L. J. 310, it is said by Field, J.: "An act of congress, then, upon a subject within its legislative power is as binding upon the courts as a treaty on the same subject. Both are binding, except as the latter one conflicts or interferes with the former. If the nation with whom we have made the treaty objects to the action of the legislative department, it may present its complaint to the executive department, and take such other measures as it may deem that justice to its own citizens or subjects requires. The courts cannot heed such complaint, nor refuse to give effect to a law of congress, however much it may seem to conflict with the stipulations of the treaty. Whether a treaty has been violated by our legislation, so as to be the proper occasion of complaint by the foreign government, is not a judicial question. To the courts it is simply the case of conflicting laws, the last modifying or superseding the earlier." S. P., Edye *v.* Robertson, Blatchford, J., 16 Rep. 547. This was recognized on all sides to be the case with Jay's treaty, which modified the prior legislation of congress as to the relations of the United States to Great Britain.

[5] *Infra*, § 506. As to conflicting action of legislature and executive, see *infra*, § 388.

[6] Leavenworth R. R. *v.* U. S., 92 U. S. 733; Chin, *in re*, 18 Fed. Rep. 306. That a Federal treaty, if constitutional, overrides a conflicting state statute, see Mager, succession of, 12 Rob. La. 584; People *v.* Gerke, 5 Cal. 381.

[7] *Infra*, § 606.

Unconstitutional part of statute may be rejected as surplusage.

§ 385. When a statute is divisible, such portions of it as are unconstitutional may be discharged as surplusage without affecting the remainder.[1] It is otherwise when the statute is not susceptible of such division, but is composed of interdependent provisions.[2]

Statute must be constitutionally passed.

§ 386. As will hereafter be seen more fully, the courts will not hold a statute to be binding unless passed in conformity with the limitations of the applicatory constitution.[3] The Federal courts will in this respect follow the adjudications of the state courts having jurisdiction, though not so far as to unseat title acquired under a prior decision of a state court affirming the constitutionality of the passage of a statute afterwards declared to be unconstitutionally passed.[4]

III. Relations of Departments of Government.

Legislative, judicial, and executive functions to be kept separate.

§ 388. There are many cases in which the executive, the judicial, and the legislative departments of government act on common ground. A striking illustration of this may be found in the electoral commission through the instrumentality of which Mr. Hayes was declared president of the United States. That commission exercised functions ordinarily belonging to the executive in receiving and testing election returns. It exercised legislative functions in laying down the law applicable to moot elections. It exercised judicial functions in deciding the several questions of law rising in the contest. If we reject

[1] Com. *v.* Hitchings, 5 Gray, 482; Middletown, *in re*, 82 N. Y. 196; Fraser, *ex parte*, 54 Cal. 94; Hinze *v.* People, 92 Ill. 406; Cooley Const. Lim., 208–14.

[2] Ibid.; Allen *v.* Louisana, 103 U. S. 80. That the unconstitutional provisions of a statute when divisible may be rejected as surplusage, see Bank of Hamilton *v.* Dudley, 2 Pet. 492; Yarmouth *v.* North Yarmouth, 34 Me. 411; Fisher *v.* McGirr, 1 Gray, 1; Berlin *v.* New Britain, 9 Conn. 175; Lea *v.* Bumm, 83 Penn. St. 237; State *v.* Allen, 2 McCord, 55; Gamble *v.* McCrady, 75 N. C. 509; Darby *v.* Wilmington, 76 N. C. 133; State *v.* Clarke, 54 Mo. 17. But this cannot be done when these provisions qualify the whole statute, in which case the whole statute falls. State *v.* Perry, 5 Ohio St. 497; Hinze *v.* People, 92 Ill. 406; People *v.* Mahaney, 13 Mich. 481; Rood *v.* McCargar, 49 Cal. 117.

[3] *Infra*, § 603.

[4] *Infra*, §§ 480, 526.

the precedent as anomalous and unconstitutional, we are still met by the union of judicial and legislative, and of executive and legislative, functions in the senate, which sits as a branch of the legislature, when performing its ordinary duties, as a judicial body when the president of the United States is impeached, and as an executive, when acting on the appointments sent to it by the president. But these cases are exceptional. As a rule, judicial or executive, functions cannot be imposed on the legislature, or legislative or executive functions on the judiciary.[1] Thus it has been held that judges cannot be required to exercise the functions of appraisers of property;[2] nor to act as agents of congress in determining what is an appropriate matter of legislation;[3] nor to appoint supervisors of elections;[4] nor to take management of corporations except through receiverships.[5] The legislature, also, cannot undertake a distinctively judicial act,[6] as the determination of a litigated case, or the granting of new trials, or the taking other revisory action when there is an adequate judicial remedy.[7] Nor can a legislature constitutionally divest existing rights by prescribing what shall be conclusive evidence;[8] nor can a legislature determine what instructions shall be given in a litigated suit pending.[9] A statute, also, directing that no judgment of a court of appeals reversing a judgment of the supreme court shall be operative unless concurred in by a majority of the judges of the court of appeal, is unconstitutional.[10] And so is action by either house of con-

[1] Kilbourn *v.* Thompson, 103 U. S. 168; State *v.* Doherty, 60 Me. 504; Denny *v.* Mattoon, 2 Allen, 361; McDaniel *v.* Correll, 19 Ill. 226.

[2] Auditor *v.* Atchison R. R. Co., 6 Kans. 500.

[3] U. S. *v.* Ferreira, 13 How. 40.

[4] This, however (Supervisor's Case, 14 Mass. 247), according to the practice of most states, does not preclude the vesting in the courts of the appointment of the officers of charitable and other public boards.

[5] Heine *v.* Levee Com., 19 Wall. 655.

[6] Ratcliffe *v.* Anderson, 31 Grat. 105; Northern *v.* Barnes, 2 Lea (Tenn.), 603; Little Rock R. R. *v.* Payne, 33 Ark. 816.

[7] Brent *v.* Chapman, 5 Cranch, 358; Leffingwell *v.* Warren, 2 Black, 599; Alexander *v.* Bennett, 60 N. Y. 204; State *v.* Jersey City, 42 N. J. L. 47; De Chastellux *v.* Fairchild, 15 Penn. St. 18; Com. *v.* Halloway, 42 Penn. St. 446; Baggs's Appeal, 43 Penn. St. 512; Dorsey *v.* Gary, 37 Md. 64; see Cooley's Const. Lim., ch. 5.

[8] *Infra*, § 494.

[9] State *v.* Hopper, 71 Mo. 425.

[10] Clepp *v.* Ely, 3 Dutch. 622.

gress committing a witness for contempt in refusing to answer as to a matter distinctively judicial.[1] This limitation, however, does not preclude legislatures from passing curative and remedial acts for the removal of clouds on titles when no vested interest is thereby impaired.[2]—Nor can the legislature assume what are distinctively executive functions.[3]—Nor is the executive, as to matters distinctively executive, subject to the

[1] Kilbourn *v.* Thompson, 103 U. S. 168; *infra*, § 397. In Massachusetts a statute enacting that M. and W. should be "husband and wife to all legal intents and purposes," M. having been previously divorced from his first wife without power to marry again, has been held unconstitutional. White *v.* White, 105 Mass. 325. That a state can divorce by legislative act unless the procedure be given by the constitution to the judiciary is a position generally accepted in this country. 2 Story's Const. Law, 259; Adams *v.* Palmer, 51 Me. 480; Clark *v.* Clark, 10 N. H. 385; White *v.* White, 105 Mass. 325; Cronise *v.* Cronise, 54 Penn. St. 255; Carson *v.* Carson, 40 Miss. 349. That special legislative divorces are unconstitutional when a judicial procedure is provided for the purpose by the constitution, see Simonds *v.* Simonds, 103 Mass. 572; Richeson *v.* Simmons, 47 Mo. 20.

[2] *Infra*, § 567.

[3] "Whatever power or duty is expressly given to or imposed upon the executive department, is altogether free from the interference of the other branches of government." Attorney-General *v.* Brown, 1 Wis. 513; and see State *v.* Kennon, 7 Oh. St. 546; *infra*, §§ 502, 573 *et seq.* See Mr. Buchanan's message of March 28, 1860; 2 Curtis's Life of Buchanan, 250. Under this head may be noticed the difficult questions arising when the house of representatives undertakes to interfere with the negotiations of a treaty. This it can only do by refusing to appropriate funds required by the treaty; and such refusal is open to great constitutional objections. As to treaties see *supra*, § 383; *infra*, § 506.

In the charge to the jury in the Dorr Case, the chief justice of Rhode Island, speaking for the whole court, said: "Courts and juries, gentlemen, do not count votes to determine whether a constitution has been adopted or a governor elected or not. Courts take notice without proof offered from the bar what the constitution is or was, and who is or was the governor of their own state. It belongs to the legislature to exercise this high duty. It is the legislature which, in the exercise of its delegated sovereignty, counts the votes and declares whether a constitution be adopted or a governor elected or not, and we cannot revive or reverse their acts in this particular without usurping their power. And why not? Because if we did so we should cease to be a mere judicial and become a political tribunal with the whole sovereignty in our hand; neither the people nor the legislature would be sovereign; we should be sovereign, or you would be sovereign." "Sovereignty is above courts and juries, and the creature cannot sit in judgment upon its creator." This opinion was approved by the supreme court of the United States in Luther *v.* Borden, 7 How. 1.

control of the courts.[1] Hence, "it is clear that the legislature cannot change the effect of such a pardon (an amnesty) any more than the executive can change a law."[2] Nor can the executive be enjoined by the courts from political action either at home or abroad.[3]—How far the legislature can leave specific questions to popular decision will be hereafter considered.[4]

Judiciary cannot supervise matter purely political.

§ 389. Chief among the checks on inconsiderate legislation is to be noticed the function of the supreme court to declare acts of the legislature unconstitutional.[5] Several interesting questions may arise as to this function. The first is that though when a statute is held to be unconstitutional it is inoperative in the special issue, it does not follow that a decision of the supreme court as to the constitutionality of certain laws precludes the executive or the legislature from subsequently taking an independent position. Of the refusal of the executive to be so bound we have several instances.[6] Thus General Jackson maintained, and maintained, according to the views heretofore expressed,[7] rightfully, that the decision of the supreme court of the United States affirming the constitutionality of the Bank of the United States did not prevent him from vetoing the bill for the bank's recharter in part on the ground of unconstitutionality; and Mr. Lincoln, in like manner, held that he was not bound by the constitutional rulings of the supreme court of the United States in the Dred Scott case. And, secondly, there are many points which by the constitution of the United States are exclusively for the executive, and with which the courts cannot interfere. This has been held to be the case with the power of pardoning,[8] with the action of the executive in interposing to put down a state insurrection,[9] and with the action of the government in recon-

[1] *Infra*, § 513.

[2] U. S. *v.* Klein, 13 Wall. 128.

[3] Mississippi *v.* Johnson, 4 Wall. 475. In Georgia *v.* Stanton, 6 Wall. 50, the supreme court of the United States refused to grant an injunction to prevent Mr. Stanton, secretary of war, from carrying into effect the reconstruction acts, the ground being that the question was political, not judicial. See more fully *infra*, § 593.

[4] *Infra*, § 601.

[5] *Supra*, § 362.

[6] See *infra*, § 522.

[7] *Supra*, §§ 22, 388.

[8] *Supra*, § 388.

[9] Luther *v.* Borden, 7 How. 1; Mississippi *v.* Johnson, 4 Wall. 475.

struction after an insurrection, so far as concerns the merely political rights of states as distinguished from the rights of individuals.[1] It is also conceded that among political questions, as to which the judicial follows the action of the executive or of the legislative departments, is to be included that of the recognition of the independence of foreign powers;[2] of the initiation or the cessation of war, either civil or foreign;[3] of the recognition of a blockade with its conditions;[4] and of the due appointment and reception of foreign ministers and consuls.[5]

[1] See *infra*, §§ 522, 593.

[2] Gelston *v.* Hoyt, 3 Wheat. 246; 1 Johns. R. 543.

[3] Georgia *v.* Stanton, 6 Wall. 50; U. S. *v.* Anderson, 9 Wall. 56; Jones *v.* Walker, 2 Paine, 688; U. S. *v.* Bales of Cotton, 10 Int. Rev. Rec. 52.

[4] The Mersey, Bl. Pr. Ca. 187. In the Protector, 12 Wall. 700, the court held that it would follow the executive in determining the question of the close of the war.

[5] Foster *v.* Neilson, 2 Pet. 254.

If we are to hold that a ruling of the supreme court of the United States binds, until overruled by the same court, not only all the other departments of government, but the nation, then the decision in Dred Scott *v.* Sandford, 19 How. 393, that the Missouri compromise is unconstitutional, was law at least until the adoption of the fourteenth amendment, and thus bound the executive and legislative departments until that period. (See *infra*, § 464.) Yet Mr. Lincoln held, and held justly, that the decision in that disastrous case, though made by judges whose purity and capacity entitle them to all reverence, was based, so far as concerned negro citizenship, on a mistaken interpretation of the constitution; and Mr. Lincoln's administration was justified at the very outset in holding that such was the case, and that negroes were citizens of the United States. If so, Mr. Jefferson and General Jackson were justified in vetoing, on the ground of unconstitutionality, acts which the supreme court had declared to be constitutional.

The position taken by both was that the president could adopt all constitutional modes of expressing his opposition to what he deemed an unconstitutional law. But neither Mr. Jefferson nor General Jackson refused to execute a law, duly enacted, on the ground of unconstitutionality; and General Jackson, though holding to the unconstitutionality of the Bank of the United States, scrupulously complied with the exactions of the statute chartering the bank, by appointing government directors, and obeying other statutory prescriptions. The position of both Mr. Jefferson and General Jackson was, that if the charter could be prevented by a veto on the ground of unconstitutionality, a veto should be interposed; but when the charter was formally granted, then the executive must see that the law was carried out. This brings us to the distinction in the text between matters political and matters judicial. When the question is whether a particular agency (*e. g.*, a bank) is to be put into operation, then the issue is political as to the constitutional rela-

§ 390. The refusal of the courts to take cognizance of political questions, and to remand such questions to executive

tions of which the executive and legislative departments of government are entitled to speak. When, however, the agency is put into operation under a statute, then issues concerning its mode of operation are matters exclusively of judicial cognizance. If, for instance, the supreme court of the United States, had declared the purchase of Louisiana unconstitutional, it is not likely that Mr. Jefferson, with the senate's confirmation of the treaty to sustain him, would, in consequence of the ruling of the supreme court, have declared the treaty to be inoperative; and it is clear that the supreme court, if applied to for a writ to enjoin him, would have said: "This is a matter with which, no matter what may be our opinions, we cannot interfere." (Marbury *v.* Madison, 1 Cranch, 137; Mississippi *v.* Johnson, 4 Wall. 475.) On the other hand, on questions as to the titles under the cession, and as to the way in which the treaty interfered with existing laws, the decisions of the supreme court would be final. See *infra*, § 394. "The decision of the court in all cases within its jurisdiction"—says Mr. Bancroft, when commenting on the debate in the convention on the judiciary clauses, and giving an abstract of their tenor (2 Bancroft's Hist. Const. 198)—"is final between the parties to a suit, and must be carried into effect by the proper officers; but, as an interpretation of the constitution, it does not bind the president or the legislature of the United States." . . . "The force of a judicial opinion of the supreme court, in so far as it is reversible, reaches only the particular case in dispute; and to this society submits, in order to escape from anarchy in the daily routine of business. *To the decision on an underlying question of constitutional law no such finality attaches.* To endure, it must be right. . . . The court is itself inferior and subordinate to the constitution; it has only a delegated authority, and every opinion contrary to the tenor of its commission is void, except as settling the case on trial. . . . To say that a court, having discovered an error, should yet cling to it because it has been once delivered as its opinion, is to invest caprice with inviolability, and make a wrong judgment of a servant outweigh the constitution to which he has sworn obedience."—"Next to the court itself, the men who framed the constitution relied upon the power and the readiness of congress to punish through impeachment the substitution of the personal will of the judge for the law." As to impeachment, see *infra*, § 394.

That the supreme court is not the exclusive arbiter of the constitutionality of an act is further illustrated by the different character of the tests of constitutionality applied by the supreme court and those applied by congress. The supreme court, in cases of equipoise, decides in favor of constitutionality. (Fletcher *v.* Peck, 6 Cranch, 87, 128; *infra*, § 606.) On the other hand, it is the duty of congress, under similar circumstances, not to force an act through. (See Cooley's Prin. Con. Law, 154, citing Osburn *v.* Stealey, 5 W. V. 85; Kellogg *v.* State Treasurer, 44 Vt. 356.) The president, who, in the exercise of his veto power, acts as a part of the legislative department, is ordinarily bound by the same rule. As other cases in which the president, as a coördinate branch of the government, has refused to be bound by the interpretation of the courts, may be men-

or legislature, as the case may be, is in harmony not only with the principle that the political and judicial departments of government should not be mingled, but with the conviction that to vest judges with the determination of political issues, does not make political questions judicial, but makes the judicial office political. Political questions, as a rule, when forced on the courts, have been decided in accordance with the political views of the judges. In the early part of the reign of George III., for instance, when the question of general warrants was thrown into the house of lords, we find Lord Mansfield, who was politically a tory, uniformly taking the tory side of the question, while Lord Camden, who was politically a whig, took the whig side. When O'Connell was prosecuted by a conservative administration for sedition, and when certain technical questions involving the regularity of his conviction came before the house of lords, we find the whig lords, Denman, Campbell, and Cottenham, voting for reversal, and Lord Lyndhurst, conservative, and Lord Brougham, then acting with the conservatives, voting for affirmance. In our own country the same effect of party sympathy has been exhibited in all cases in which judges have been compelled to decide political issues. During the war of 1812, the federal judges were strict-constructionists, so far as concerned the war power, while the democratic judges upheld without reservation the war power claimed by the administration. During the late civil war, the same questions were again, when they reached the bench, affected by party considerations, at this time, however, the democrats being usually strict constructionists, their opponents liberal constructionists. That the Dartmouth College question was largely affected by political considerations, will be hereafter incidentally noticed;[1] and these influences, beginning at the argument before the supreme court of New

Dangerous consequences of judicial assumption of such functions.

tioned General Jackson's action in the Cherokee case (Worcester *v.* Georgia, 6 Pet. 515; 1 Webster's Works, 268), and President Lincoln's course in reference to the suspension of the *habeas corpus*, in which he refused obedience to the decision of Taney, C. J., in Merryman's Case (Taney's Dec., 246), and in which he was sustained by Mr. Binney and other authorities. *Infra*, § 536; Whart. Cr. Pl. and Pr., § 979.

[1] *Infra*, § 483.

Hampshire, did not cease to operate when the case was before the supreme court of the United States.[1] When the constitutionality of the conscription laws first came up before the supreme court of Pennsylvania, a majority of one, the judges voting according to their party proclivities, pronounced the laws unconstitutional. Shortly afterwards an election took place in which a republican judge was substituted for one of the democratic majority, who was a candidate for re-election, and the decision on a re-argument was overruled by a majority of one. When five judges of the supreme court of the United States took their seats on the commission by which the contest between Mr. Hayes and Mr. Tilden was determined, it was found that the judicial members of the court voted uniformly with those of their party among its legislative members upon the numerous questions of technical law that arose during the hearing. It is remarkable that the judges, who, in this country and in England, have thus divided under the influences of party sympathy, have been among the most high-minded and impartial magistrates whom either country has known. That when they took up political questions they felt the force of political influences, is a reason which weighs with peculiar potency on judges themselves, when they hold that in matters political the courts are to follow the law-making and law-executing departments of the state. A question does not cease to be political when transferred from congress to the bench. But the bench ceases to be judicial when it takes upon itself the political functions of executive or legislature. The consequences of such a transfer of political functions to the courts, should it be adopted as a system, would be that the courts would lose their influence as arbiters of law, and by their subjection to the mutations of politics, not only would one of the great conservative checks of the constitution be lost, but the popular reverence for law and its ministers would be shattered. It is true, that these remarks do not apply to cases in which the determination of a point of political interest is necessarily incidental to the determi-

[1] See particularly Shirley's History of Dartmouth College Cases, 1879, a work of great interest; Lodge's Life of Webster, pp. 79 *et seq.*

nation of a pending civil issue; and it is true, also, that most of the illustrations above given, fall within this category. But what has been said is of weight, when the question arises, as it did in the case of the electoral commission, whether political questions shall be referred to particular judges for settlement, or when it is proposed, as occasionally happens in some of the states, to ask the opinion of the supreme court on a political measure. The legislature has no more constitutional power to impose legislative functions on the judiciary than it has to assume judicial functions for itself.

Court cannot compel executive to testify in court, or exact disclosure of political secrets.

§ 391. It is also settled that the courts will not attempt to compel the attendance in court of the chief magistrate of the country, or in fact, of any public officer whose duty to the public requires that he should remain at a specific post. Such a power vested in the judiciary would impair the coördination of the two branches of the government as well as subject the executive to inconveniences which might seriously injure the public interests. If, as Mr. Jefferson argued, when the attempt was made to compel his attendance at Richmond on the trial of Burr, the executive can be required to attend at one trial he can be required to attend at another, and in this way his attention might be compulsorily withdrawn at any moment from public business, no matter how disastrous might be the consequences. Mr. Jefferson, in that case, therefore, announced his determination not to permit the enforcement of the writ, though he offered to be examined before a commissioner at Washington. No attempt was made to coerce his attendance:[1] and the tacit recognition thus given of the exemption of the chief executive from attachment has been subsequently followed in other courts.[2] Nor, when the attendance of subordinate executive officers is secured, or when the chief executive waives his privilege and attends, will the court exact the disclosure of matters of which the executive holds the publication would be detrimental to the public interests.[3]

[1] See Randall's Jeff., iii. 216; *infra*, § 513.

[2] Whart. on Ev., § 604.

[3] Whart. on Ev., §§ 604 *et seq.*

§ 392. As is elsewhere seen, it has been declared in England that a statute grossly unjust and repugnant to reason may be delared inoperative by the courts.[1] There is no case, however, of the English courts annulling a statute on these grounds; nor, *à fortiori*, can we hold such a power to reside in the courts of this country in cases in which the act criticized is not repugnant to particular constitutional limitations. The very fact that there is a constitution limiting legislative power is an implication that the power of the legislature is absolute in matters as to which no limitation is imposed.[2] But when there are conflicting constructions to be given to a statute, that which is most consistent with justice will be preferred.[3]

Courts cannot annul legislation because unjust.

§ 393. It has been already observed that among the dangers to which a popular government is exposed, one of the most serious is that of giving immediate effect to transient popular impulses.[4] That this is a great defect of the English system has been also noticed.[5] With us it is far different. Our elections are at periods prearranged by our fundamental laws, and cannot be sprung on us by dissolution or other executive appeal. A sweeping majority in favor of a particular party may be elected this autumn to the house of representatives; but this majority will be confronted by a senate, two-thirds of which represent the majorities of two and of four years back. Even the new senators are elected, not by the people of their states, but by legislatures which are not necessarily in sympathy with the numerical majority of the state. The senate, also, unlike the house of lords, is as potent a factor in legislation as is the more popular house; and, as it is elected by the legislatures of the states, may persistently differ in party matters from the majority of the house. This has often been the case. During General Washington's second administration, the house of representatives on the important issue of Jay's treaty, opposed the administration, while it was supported by a majority of two-thirds of the senate. General

Inconsiderate legislation precluded by reciprocal checks.

[1] See *infra*, § 608.
[2] Ibid.
[3] *Infra*, § 615.
[4] *Infra*, § 362.
[5] *Supra*, §§ 18, 362; Bagehot, Eng. Const., 261 *et seq.*

Jackson, though invariably supported by a majority of the house of representatives, and though commanding immense majorities in the electoral college, was, during the most critical periods of his administration, held in check by an adverse majority in the senate, by which his nominations were rejected, and measures passed by the house in conformity with his views defeated. Since the late civil war, and eminently in the great crisis which terminated in the inauguration of Mr. Hayes, the senate and the house have been frequently in collision, the senate rejecting numerous measures passed as necessary by the house. So far from the senate losing ground by these exercises of power, as would be the case *mutatis mutandis* with the house of lords, there have been no periods in our history in which it has stood higher than in those in which it has thus dissented from the house; and instances are frequent in which, in cases of collison between the senate and the house, it is the senate which has been finally sustained by the people. So is it, also, with the president's veto.[1] In England the veto is practically obsolete; in this country its exercise has become more and more frequent, and so far from such exercise being unpopular, there are few vetoes which public sentiment has not ultimately approved. The courts, also, have exercised with increasing freedom the power of rendering statutes inoperative on the ground of unconstitutionality; and their action in this respect, *e. g.*, in annulling as unconstitutional the statutes establishing military tribunals in peace, and those interfering with state supremacy in civil rights, has been in unison with the popular sense of what is right and fit. So far then from the constitution permitting the legislative will to take immediate effect, there is no other country with free institutions which subjects legislation to such slow tests, and which appeals so patiently and gravely to the mature conclusions of the people in legislation as distinguished from their immediate impulses. The majority of to-day speaks but does not rule. It only rules when it coincides with the majorities of two and of four years ago, or when it calls to its aid the majorities of two or four years hence.

[1] *Infra*, §§ 398, 512.

And even then its action is open to be defeated by the veto of a president elected by a distinct constituency, or by its rejection as unconstitutional by a supreme court appointed for life by the president and senate. There is no country which so emphatically maintains the doctrine of national continuity as does the United States.[1]

Supreme court not thereby made absolute.

§ 394. It may be said that making the supreme court arbiter in all matters of litigation involving the constitutionality of Federal or state laws, gives absolute power to the supreme court. The answer to this is twofold: In the first place, the action of the supreme court does not, as we have seen,[2] bind the other departments of government in matters within their distinctive range. In the second place, although it is possible for the supreme court to clog the wheels of legislation by undue exercise of its power in declaring statutes unconstitutional, the remedy is obvious. A bare majority of the house can impeach; a majority of two-thirds of the senate can remove from office.

Senate is the representative of the states, and has coördinate legislative powers.

§ 395. The senate of the United States under the constitution is composed of representatives of the states, two members being elected by each state, but at different periods, arranged in such way that the terms of one-third of the senators expire once every two years. The vice-president of the United States is president of the senate, but has no vote unless the

[1] See as to this doctrine Hooker's and Bacon's views, *supra*, § 86.

The clothing the judiciary with the prerogative of refusing execution to an unconstitutional statute is peculiar to this country, and is one of the principal safeguards of the permanency of our constitution. To the absence of a tribunal capable of exercising this essential function may be attributed the little respect paid by executive and legislature from time to time to the constitutions of leading European states. In England there can be no violation of the constitution by parliament since acts of parliament make the constitution. But in France, where there have been a succession of written constitutions, superior, one would suppose, to executive and legislature, executives and legislatures have never hesitated to overstep the constitutional limitation when they have had an important object to effect thereby, nor has there been any pretence that they could be restrained in such action by the judiciary. See Lawrence, Comm. sur Wheaton, iii. 50.

[2] *Supra*, §§ 388 *et seq.*

members are equally divided. He decides all questions of order, subject to an appeal to the senate. A senator, to be eligible, must be thirty years of age, and must, at the time of his election, have been nine years a citizen of the United States. The ordinary mode of election of a senator is by joint ballot, though the practice at first was for the houses of the legislature to sit separately in this as well as other legislative functions, and the voting to be continued until the houses should agree.—The senate has coördinate legislative powers with the house, with the exception that it cannot initiate a revenue bill. Its assent, by a majority of two-thirds, is necessary to the ratification of treaties; and all appointments to office must be with its "advice and consent." In this limitation, however, the term "advice" is supposed to be merged in consent, and while the senate may reject or confirm, it no longer "advises," in the sense of counselling, the president in making his nominations.[1]

House of representatives elected by the people, the states fixing the franchise, and has coördinate legislative power; and chooses its own speaker.

§ 396. The house of representatives, under the constitution, is chosen every two years by the people of each state who are qualified electors of the most numerous branch of the legislature of such state. The time and place of the election may be appointed by the legislature of each state, subject to the supervision of congress; and congress has exercised this supervision by requiring the election to be by single districts, the division of the states into such districts to be made by the state legislatures. It has been held by the supreme court of the United States[2] that an act of congress making it indictable to resist a Federal officer of election for members of the Federal house of representatives is constitutional. And it has been further held[3] that an act of congress is constitutional which inflicts penalties on state officers of elections for the violation of duty under a state statute in reference to election of representatives to congress. The question whether the United States can, in this way, direct the duties and employ the time of state officers is

[1] See *supra*, § 19.

[2] Siebold, *ex parte*, 100 U. S. 371.

[3] Clarke, *ex parte*, 100 U. S. 399. Field and Clifford, JJ., dissenting.

one of much difficulty, and is elsewhere noticed.[1] And notwithstanding the ruling in the case now before us, it may still be maintained that while state officers may be indicted for resistance to Federal laws, congress cannot, as a rule, make them agents to execute Federal laws, nor can the Federal judiciary punish them for an imperfect discharge, as such, of the duties to their own state.—The clause of the second section of the first article which provides that the "electors (of the house of representatives) in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature," is spoken of by Judge Story as a defect;[2] the objection as stated by him being that it not only recognizes state franchise as the basis of national franchise, but puts it within the power of the states to modify at their discretion the constituency of congress. But the clause represents a condition of things to which popular instincts ascribed permanency, rather than a theory of government. The states were forever to be united, yet they were forever to be united as states. And since as states they had populations varying greatly in character, so each state had its own distinctive tests of electoral franchises which, conducive to its own due development, were for this reason conducive to the due development of the country as a whole. Nor can it be denied that this diversity in unity has not become less important in more recent days. Educational tests, which in some states are wise and politic, would be regarded in other states as unduly oppressing particular classes or races. In some states it may be desirable to impose a stringent registry law; in others this would be impracticable. In some states a property qualification may, at least under certain conditions, appear expedient; in most states such a qualification would be regarded as unjust and inconsistent with settled conditions. In some states the policy is to extend the suffrage to all emigrants; in other states to impress on this line of franchise marked limitations. The social and physical diversities that existed at the time of the framing of the constitution exhibited themselves in this establishment of diversity of franchise; and the traditions as well

[1] *Infra*, § 524.

[2] Story on the Constitution, § 817.

as the continuing diversities of the country exact the maintenance of the same discriminations.—So far as concerns other tests, it is prescribed in the Federal constitution that to enable a representative to take his seat, he must be twenty-five years of age, and have been seven years a citizen of the United States. The constitution also requires that the representatives are to be apportioned among the several states according to their respective numbers, excluding Indians not taxed. The maximum number of representatives is one for every thirty thousand inhabitants; and every ten years a census is to be made of the entire people, on the basis of which apportionment is to be made.—The house has coördinate powers with the senate in legislation, the assent of both houses being requisite to the passage of a statute. Congress, it should be added, is to meet every year, the first Monday of December being designated for this purpose, unless another day be specified by statute.—The house of representatives chooses its own speaker, to whom, by the practice of the house, is assigned the appointment of committees.

Each house determines its own elections and rules; is bound to keep a journal; requires a majority for a quorum; may punish for contempt; is limited as to adjournments; is privileged as to debate; and may expel members.

§ 397. Each house is the exclusive judge of the validity of the election of its own members, and may adopt such rules as it may think fit for the preservation of order. Each house must keep a journal of its proceedings; and so stringent was supposed to be the effect of this provision, that on the adoption of Mr. Benton's resolution to expunge the censure passed in a previous session on General Jackson, Mr. Webster and other eminent senators filed a protest on the ground that the expunging was unconstitutional. Unlike the house of commons, in which forty members constitute a quorum, it is necessary, to constitute a quorum of either senate or house, that a majority of members should be present, though a smaller number may adjourn from day to day and compel the attendance of others. Each house may commit for contempt a person disobeying its injunctions, *e. g.*, as in refusing to testify before a committee; but such imprisonment does not continue after the close of the session

during which the sentence was imposed.[1] But the houses of congress have no power to commit for contempt witnesses refusing to answer matters belonging distinctively to judicial inquiry.[2] Neither house, while a session is in progress, can, without the consent of the other, adjourn for more than three days, nor to a place other than that in which the two houses are sitting; though the senate, when transacting executive business, or engaged in the consideration of treaties, may sit independently of the house. Either house can inflict censure or other temporary discipline on its members for disorderly conduct, and may expel a member by a vote of two-thirds. A member of congress is privileged from arrest during the sessions of the house to which he belongs, and in going to and returning from the same, except in cases of felony, treason, and breach of the peace. A member, also, cannot be called to account for words spoken in debate; and such words are privileged when presented in the shape of a *bona fide* report of the proceedings.[3] This provision exempts members of congress from liability elsewhere for any vote, or report, or action, in the performance of their legislative duties.[4] Whether a member of congress can be impeached for acts done, or words said by him in his legislative capacity, has been questioned; but the prevalent opinion is in the negative.[5]

President has a qualified veto.

§ 398. The president is so far a branch of the legislature that if he interposes his *veto* on a bill—that is to say, if he returns a bill to the house in which it originated with a message refusing to give it his approval—it does not become a law unless it has a majority of two-thirds of both houses.[6] The veto, however, must be sent in within ten days, Sunday excepted, from the time when the bill was presented to him; though if congress adjourns before the

[1] Anderson *v.* Dunn, 6 Wheat. 204.

[2] Kilbourn *v.* Thompson, 103 U. S. 168; overruling in part Anderson *v.* Dunn, 6 Wheat. 204; see *supra*, § 388. See, however, Doyle *v.* Falconer, L. R. 1 P. C. 328, where it was held that the power of imprisonment for contempt is judicial, not legislative.

[3] Wason *v.* Walter, L. R., 4 Q. B. 73. It is otherwise as to speeches independently published by a member, 1 Kent Com. 236.

[4] Kilbourn *v.* Thompson, 103 U. S. 168; Coffin *v.* Coffin, 4 Mass. 1.

[5] *Infra*, § 399; 2 Story's Com. Con. 259.

[6] *Infra*, § 512.

ten days expire, the bill fails if it is not signed by the president. It was at one time questioned whether the limitation of two-thirds in the constitution refers to two-thirds of the entire house, or two-thirds of the quorum present when the bill, as returned, is voted on. The latter is now the accepted construction. The vote, it should be added, on the bill after a veto, must be by ayes and noes, and must be entered on the journal. The provision is peculiar to the United States. In Great Britain while the veto was under the old practice absolute, it has fallen into such abuse that it may now be regarded as no longer existing.[1] In this country, however, notwithstanding the vehemence with which its exercise has been denounced, it is now conceded, as we have seen, that this exercise has been in the main salutary.[2]

Civil officers may be impeached.

§ 399. Impeachment, under the constitution, is the process by which high civil officers of the government may be brought to trial.[3] The bill of impeachment is instituted by the house of representatives, a majority being required for this purpose. The trial is by the senate, a majority of two-thirds being necessary to convict. On the impeachment of the president of the United States, the chief justice presides. The process, so it was ruled by the senate in the case of Senator Blount, applies only to executive and judicial officers, and cannot be extended to senators and representatives.[4]—Whether impeachment lies for any but indictable offences has been questioned. The words used in the constitution, "high crimes and misdemeanors," would, by themselves, confine the proceeding to indictable offences.[5] They have been held, however, both in England

[1] See *supra*, § 18; Bagehot, Eng. Const., 1-57–118.

[2] *Supra*, § 393; *infra*, § 512.

[3] Const., art. i., § 2, ch. 5.

[4] The ruling of the senate in Blount's case was dissented from by eminent lawyers in the house of representatives and elsewhere at the time, and cannot be regarded as a final settlement.

[5] See, as exhibiting this view, 6 Am. Law Reg., N. S. 257, and Minority Report of House Committee, Nov. 25, 1867. The question is discussed in Pomeroy, Const. Law, §§ 717 *et seq.* Both houses of congress, in the cases of Pickering, Chase, and Humphreys, took the ground that misconduct not constituting an indictable offence would sustain an impeachment. That this view was taken by some members of the constitutional convention, see 1 Elliott's Deb., 158, 213, 222, 228, and

and in this country, and with good reason, to cover all cases of such official misconduct as would be indictable at common

citations in Pomeroy's Const. Law, § 727; but that it was not intended to give the power to remove for acts detrimental to the public service, is shown by the rejection of an amendment to this effect. Madison Papers, pp. 340, 481.

It is argued, however, by Professor Dwight, in 6 Am. Law Reg., N. S. 257, that impeachments can only be maintained for offences indictable in the United States courts, and that as the United States courts have no common law jurisdiction, impeachment only lies for offences made indictable by Federal statute. Admitting, however, that the Federal courts have no common law criminal jurisdiction (as to which, however, see Whart. Crim. Law, 8th ed., § 253), it by no means follows that in the clause before us "high crimes and misdemeanors" mean indictable statutory offences. If this was intended it would have been so expressed. And the very fact that indictments for crime are provided for in other clauses, and that this procedure is of a cumulative and semi-political character, shows that the two remedies were distinct, and are to be subjected to different considerations. If it were intended that impeachment should be only for indictable statutory offences, there would be no need for this clause. All that would have been necessary would have been to provide that on conviction of a statutory crime or misdemeanor a civil officer should be removed from office. See Blount's Trial, Whart. St. Tr. 264. This difficulty is obviated by assuming that "high crimes and misdemeanors" are to be interpreted to mean "high crimes and misdemeanors at common law." This would enable an impeachment to be sustained in cases of misconduct in office indictable at common law (as to this range of cases, see Whart. Crim. Law, 8th ed., §§ 1568 *et seq.*), while it would exclude impeachments based on mere political blunders. That such is the better view in England, see 2 Woodeson's Lectures, pp. 596 *et seq.*; 4 Steph. Com., 299; argument of Mr. Webster in Prescott's Trial, 5 Webster's Works, 502; and a learned article in 21 Am. Law Reg., N. S., pp. 798 *et seq.* The charge of drunkenness on the bench, as well as of corrupt refusal to hear witnesses on a trial, on which Judge Pickering was convicted and removed from office in 1804, would have been an indictable offence at common law, if it were not impeachable, in a court having common law jurisdiction. The same may be said of the conviction of Judge Humphreys in 1862, and of the conviction of Judges Barnard, McCann, and Smith in New York. See summary in 21 Am. Law Reg., N. S., pp. 814–15.

That the words "crimes and misdemeanors" are not to be limited by the insertion of "statutory," see 1 Story, Const., § 797. It is to be observed, also, that even supposing that the rulings of the supreme court that there are no common law crimes against the United States, are applicable to this clause, the senate of the United States, sitting on an impeachment, is of coördinate rank with the supreme court, and is not bound by the rulings of that court. On the other hand, if we were rigorously to apply the rule that an offence, to be impeachable, must be technically indictable, we should be exposed to an awkward dilemma. It is well settled that an indictment does not lie for an offence distinctively im-

law were there no process of impeachment.—The trial is to be conducted before the senate on legal principles, the rules of evidence being those adopted in common law courts. The punishment designated by the constitution is removal from office, and disqualification from holding office in the future.

Amendments may be made by convention or by action of congress and states.

§ 400. By article fifth of the constitution it is provided that "the congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes, as a part of this constitution when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided, that no amendment which may be made prior to the year 1808, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state without its consent shall be deprived of its equal suffrage in the senate." A minority of a little over one-third in either house of congress, therefore, can defeat an amendment in its first stage; a minority of a little over one-fourth can defeat an amendment in its second stage. To overcome such obstacles requires a very strong wave of popular feeling; and it is to such an impulse that we are to impute the passage of the two distinct groups of amendments which, under auspices very different, have been added to the constitution. The first group, consisting of the first eleven amendments, was passed under an implied understanding between the friends and the more conservative of the opponents of the constitution that the latter

peachable. (Whart. Crim. Law, 8th ed., § 1571.) If we should hold that an offence is not impeachable which is not indictable, it would follow that an offence which is impeachable is not impeachable. The true view is that an offence is impeachable which would be at common law indictable were there no technical limitations in the way; and as all corrupt and negligent misconduct in office causing injury to the public or to an individual is indictable at common law, supposing there be no process of impeachment provided, so an impeachment lies for such corrupt or negligent misconduct in office causing such injury. But it certainly does not lie for error of judgment.

would withdraw their opposition if amendments were adopted in the nature of a bill of rights. These amendments have been called truisms, and so some of them are; but the amendment declaring that "the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people;" and that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," are of cardinal importance, and derive peculiar authority from the fact that in a period when there was every opportunity for calm consideration they were unanimously adopted.—The thirteenth, fourteenth, and fifteenth amendments were adopted under very different circumstances.[1] The wounds of the civil war were still fresh; the southern states had, it is true, abandoned all further opposition to the government, but a large majority of the previously dominant race had been disfranchised, and the control of these states had passed into the hands of men in thorough unison with those who desired to incorporate into the constitution provisions which would thoroughly protect the negro race in the freedom which was one of the necessary consesequences of the war. How far the withdrawal of the assents given to these amendments by the legislatures of New York, New Jersey, Ohio, and Oregon were operative[2]—what weight is be assigned to the position that the assent of the southern states was given by legislatures which were not freely elected under republican constitutions[3]—are questions which were once argued with much zeal, but which have lost their interest, since the amendments have been repeatedly ratified by

[1] *Infra*, §§ 584, 593.

[2] New Jersey and Ohio assented to the fourteenth amendment, and afterwards, before three-fourths had assented, withdrew their assent. The assent of Oregon was withdrawn after the majority of three-fourths was obtained. New York, after assenting to the fifteenth amendment, withdrew her assent before three-fourths of the states had assented to that amendment. The subsequent restoration of the seceding states, all of whom ratified the amendments, made it unnecessary to determine how far the withdrawals of assent above mentioned were operative. The question, however, is now set at rest by the acceptance by the federal supreme court without contest of the amendments as validly adopted, and by a similar acceptance by all the state courts. As to reconstruction acts, see *infra* §§ 584 *et seq.*, §§ 593–6.

[3] *Infra*, § 593.

the supreme court of the United States, as well as by the southern states themselves after the reconstruction era closed. It may be a matter of regret that these amendments did not place around the Indians, whose ancestors occupied our land, the same safeguards as are placed around the negro. It may be, also, a matter of regret that Asiatic emigrants should not receive the same protection.[1] But, taking them in the sense given to them by the supreme court of the United States, it may be safely asserted that the enfranchisement clauses are now sustained by a vast preponderance of sentiment both northern and southern. And the clauses prohibiting arbitrary state legislation are likely to be at least as beneficial, in their operation, as the prior amendments restraining arbitrary federal legislation.[2]

Inferences to be drawn from the obstacles in way of amendment.

§ 401. From the obstacles interposed by the constitution in the way of its own amendment, several inferences may be drawn tending to strengthen the positions taken in previous sections.

(1) The hypothesis that the majority of the aggregate nation is to determine its destinies, as we have already seen, is negatived by the fact that the people are so distributed in states that a majority in the electoral college, and in both houses of congress, may represent what is a numerical minority of the people of the nation as an aggregate. We are here, in addition, met with the remarkable fact that a minority of a little more than one-fourth of the legislatures of the states, which may represent an even smaller minority in the popular vote, may preclude permanently the adoption of constitutional amendments.

(2) The impediments placed in the way of rapid and impulsive legislation, with which the traditions of the people had familiarized them, have here their most striking exhibition. The amendment of the constitution is thus made a long process. An amendment, if specifically proposed, must first go through each house of congress by a majority of two-thirds. It must then go to the states, and so various are the terms of tenure of the state legislatures that a period of deliberation must inter-

[1] *Infra*, §§ 434, 435, 585.

[2] See *supra*, § 373, *infra*, §§ 584 *et seq.*, 593–596.

vene which must necessarily block the way of hasty action. If the constitution were not couched in terms less cautiously selected—if these terms were not, so far as the practical working of government is concerned, sufficiently broad and elastic to allow for the adaptation of legislation to the country's growth and development—the interposition of these checks might work serious mischief. As it is, they have worked beneficently since they have tended to strengthen three salutary and important principles. *First*, the constitution is an aggregate of compromises which should not be disturbed except on long deliberation and by a very large majority. It is the outgrowth, in part of past, in part of constant national conditions; and no nation can be safely separated either from its past or from its constant conditions except by slow processes caused by the change of these conditions making continuity with the past impracticable. *Second*, organic changes in government should be slowly made. The fewer changes of this class are made—the more completely a nation is left to develop itself, within the limits of a liberal but settled system—the greater is the opportunity for growth of the people in strength and prosperity.

(3) The elaborate processes of amendment prescribed give an additional proof that the constitution was intended to be, to recur again to the words of Chief Justice Chase, an indestructible union of indestructible states. Perpetual protection against subversion, coupled with the power of self-amendment on great emergencies when required by the general sense of the community, are here guaranteed. The right of voluntarily setting aside the whole system by the action of a single state cannot coexist with the solemn and anxious stipulations here introduced that if more than one-fourth of the states object to a change, no change is to be made.

IV. Taxation.

§ 404. The first power specifically given to congress is as follows: "The congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and

Power of taxation vested in congress,

but taxing must be uniform.

general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States."[1] The first observation to be made on this clause, is that the words "provide for the common defence and general welfare of the United States," are a qualification of the taxing power. The *taxation* is "to pay the debts and provide for the common defence," etc. Congress, at least by this clause, has not power to "provide for the common defence and general welfare." How far it can do this is determined by subsequent clauses. Whatever it has power to do under such clauses, this clause authorizes it to impose taxes to pay for. The next observation to be made is that such taxes are to be uniform. This, however, does not make it necessary that each state should have only a fixed quota in proportion to its wealth to pay. A stamp tax, for instance, will bear much more harshly on a commercial than on a farming community; but a tax on stamps is not thereby unconstitutional. The only limitation, therefore, on taxation, so far as concerns its operation, is that of formal uniformity. The object of the limitation is to prevent capricious or oppressive discriminations such as those which during the middle ages made the Jews and other odious classes the parties on whom peculiar burdens were to be imposed. But the limitation does not preclude the taxing of particular lines of business. It merely requires that particular sections, or particular lines of population, should not be singled out as such for peculiar taxation.[2]

[1] Const., Art. I. § 8, cl. 1.

[2] That taxing must be uniform, and that the fourteenth amendment makes this obligatory on the states, see *infra*, §§ 588, 599; Cummings v. Bank, 101 U. S. 153; Weightman v. Clark, 103 U. S. 256; State v. Runyon, 41 N. J. L. 98; Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560; Appeal Tax Ct. v. Rice, 50 Md. 302; North Carolina R. R. v. County, 82 N. C. 259. Under a state constitution prescribing that taxing must be uniform, unequal valuations by a board of assessors are unconstitutional, and such unequal action may be restrained in equity. Cummings v. Bank, 101 U. S. 153; see Livingston v. Darlington, 101 U. S. 407. As to uniformity in reference to state laws, see *infra*, §§ 482, 588. As to effect of fourteenth amendment, see § 588. Under the Federal constitution, a tax levied by act of congress on the deposits in savings banks is a tax on the banks, and not on the depositors, and is therefore uniform and not unconstitutional. German Savings Bk. v. Archbold, 15 Blatch. 398. That the

§ 405. So far as concerns its nature, it may be stated that "tax," in its general sense, includes all imposition laid by sovereign on subject for the purpose of revenue. In the clause before us, however, are added, as if by way of explanation, "duties, imposts, and excises." "Duties" and "imposts" have the same meaning, being taxes levied on articles imported or exported.[1] But the term "tax" is to some extent explained by the more technical terms "duties, imposts, and excises." It is wrested by this association from the general range to which it might otherwise be assigned, and placed among terms of art used to express stated government levies for public support. Taken by itself it might include benevolences or other exactions, such as the Tudor sovereigns occasionally imposed. As qualified, however, by the succeeding terms, and as restrained by the provision as to uniformity, it is to be regarded as denoting a uniform levy on persons or property made in conformity with preannounced law.

"Tax" a generic term.

§ 406. Notwithstanding the position taken by leading statesmen in this country during the Revolutionary war, the supreme court of the United States has held that there is no such necessary connection between taxation and representation that the taxation of an unrepresented section is of itself unconstitutional. It is competent, therefore, for congress to tax the District of Columbia and persons on land ceded to the United States for naval or military purposes, though such sections are not represented in congress; and the same power extends to unrepresented territories.[2] Perhaps the two positions may be reconciled by holding that while in all widely extended countries there are exceptional or transitional cases in which unrepresented areas of territory are not taxed, it is a general rule of liberal politics that no taxes can be imposed on a country as an aggregate unless they have been imposed by the aggregate representatives of the country.

Taxation not necessarily conditioned on representation.

distinctions in the text were accepted on all sides on the adoption of the constitution, see Madison Papers, 302–509.

[1] See National Bank *v.* U. S., 101 U. S. 1

[2] Loughborough *v.* Blake, 5 Wheat. 317. As to Indians, see *supra*, § 26.

§ 407. By a clause in the constitution, "direct" taxes are to be apportioned among the states according to their representative population; and in order to give this limitation effect, it has been found necessary to invest the word "direct" with a peculiarly artificial meaning. It is impossible, without great injustice, to apply the rule of *pro rata* apportionment among the states to taxes on income of insurance companies,[1] to taxes on carriages,[2] and to taxes on banks;[3] and hence taxes on income, on carriages, and on banks have been declared not to be "direct" taxes. In fact, under these rulings, and the reasoning on which they are based, the only taxes that can properly be called "direct" are poll and land taxes. Taxes which are laid on property which settles in large masses in some sections, but scarcely exists in others, cannot be apportioned according to population among the states.[4]

"Direct" taxation limited to poll and land tax.

§ 408. "No tax or duty," so it is prescribed in the constitution, "shall be laid on articles exported from any state." It is obvious that this limitation applies to articles when they are in the act of passing the boundary of a state on their way to another state or to a foreign land, in the same way that duties and imposts apply to articles when in the act of passing a boundary from a country outside of such boundary. Hence the limitation immediately before us does not apply to articles not in such state of passage, and does not, therefore, prohibit an excise on such articles; nor does it prohibit an embargo as a war measure, nor closing ports temporarily for health or police purposes.[5] But a state law imposing a stamp tax on bills of lading of gold exported from a state is unconstitutional.[6] By the second sub-clause

Limitation as to exports does not attach to things that may be exported nor to embargo or inspection laws.

[1] Pacific Ins. Co. *v.* Soule, 7 Wall. 433.

[2] Hylton *v.* U. S., 3 Dall. 171.

[3] Veazie Bank *v.* Fenno, 8 Wall. 533.

[4] See discussion in 1 Kent's Com., 256, and article by Mr. G. T. Curtis in Harper's Monthly Magazine for August, 1866.

"Our conclusions are that *direct taxes*, within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." Swayne, J., Springer *v.* U. S., 102 U. S. 586. Hence the United States income tax is not a direct tax. Ibid.

[5] *Infra*, §§ 425, 486, 565.

[6] Almy *v.* California, 24 How. 169.

of section ten, article first, it is provided that "no state shall, without the assent of the congress, lay any imposts or duties on imports or exports, *except what may be absolutely necessary for executing its inspection laws;* and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of congress." Under this clause it has been held that a state has a constitutional right to enact inspection laws providing for the inspection and verification of commodities produced or manufactured in the state;[1] and it has been ruled that, "to constitute an inspection law, an examination of the article itself is not necessary, but that to prepare the products of a state for exportation it may be necessary that such products should be put in packages of a certain form, and of certain prescribed dimensions, either on account of the nature and character of such products, or to enable the state to identify the products of its growth, and to furnish the evidence of such identification in the markets to which they are exported."[2] "Exports,"

[1] See Gibbons *v.* Ogden, 9 Wheat. 203; Passenger Cases, 7 How. 283, 408; Foster *v.* New Orleans, 94 U. S. 246; Webber *v.* Virginia, 103 U. S. 344; and cases cited *infra*, §§ 418 *et seq.*

[2] Turner *v.* Maryland, 55 Md. 240, aff. 107 U. S. 38.

Of inspection laws, copious illustrations are given in the opinion of Blatchford, J., Sup. Ct. U. S., 1883 (22 Am. Law Reg., p. 199): "It was in reference to such laws," he states, "among other inspection laws, that Chief Justice Marshall, in Gibbons *v.* Ogden (page 203), after remarking that a power to regulate commerce was not the source from which a right to pass inspection laws was derived, said: 'The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves.' It was not suggested by the court that those particular laws were not valid exercises of the power of the state to fit the articles for exportation, or that in addition to, or even aside from, ascertaining the quality of the article produced in a state, the state could not define the form of the lawful package or its weight, and subject form and weight, with or without quality, to the supervision of an inspector, to ascertain that the required conditions in respect to the article were observed."

"There is another view of the sub

as used in the sub-clause above cited, refers exclusively to articles exported to foreign countries, and does not include articles brought from one state to another.[1] The mere fact that such charges bear upon commerce does not make such statutes unconstitutional.[2]

United States government cannot tax state or

§ 409. The United States and the state governments, so far as their respective property is concerned, are coördinate sovereignties, neither of which can tax the other. Were this power of taxing the other vested in either, this would not only be inconsistent with the doctrine

ject which has great force. Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds—all these matters being supervised by a public officer having authority to pass or not to pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirements, or the inspection may be made to extend to all of the above matters. When all are prescribed, and then inspection as to quality is dropped out, leaving the rest in force, it cannot be said to be a necessary legal conclusion that the law has ceased to be an inspection law.

"As is suggested in Neilson *v.* Garza, 2 Woods, 287, by Mr. Justice Bradley, it may be doubtful whether it is not exclusively the province of congress, and not at all that of a court, to decide whether a charge or duty, under an inspection law, is or is not excessive. There is nothing in the record from which it can be inferred that the state of Maryland intended to make its tobacco-inspection laws a mere cover for laying revenue duties upon exports. The case is not like that of Jackson Mining Co. *v.* Auditor-General, 32 Michigan, 488, where a state tax imposed on mineral ore exported from the state before being smelted was held to be a tax on interstate commerce, no such tax being imposed on like ore reduced within the state. The question of the right of Maryland, under the constitution of the United States, to require that the dimensions and gross weight of a hogshead containing tobacco grown upon its soil shall be ascertained by its officers before the tobacco shall be exported, is a question of law, because the question is as to whether such law is an inspection law. Moreover, the question as to whether the charges for such examination and its attendant duties are 'absolutely necessary' was not before the state court, and was not passed upon by it, and cannot be considered by this court."

[1] Woodruff *v.* Parham, 8 Wall. 131–3; Machine Co. *v.* Gage, 100 U. S. 676.

[2] Gibbons *v.* Ogden, 9 Wheat. 203; License Cases, 5 How. 577; Hall *v.* De Cuir, 95 U. S. 485; Foster *v.* New Orleans, 94 id. 246. As to state restrictions on imports, see *infra*, §§ 421 *et seq.*

state tax United States property.

of the co-ordination of sovereignties above stated, but it would give the sovereign exercising the power the means of seriously crippling the other.[1] Hence it has been held that the United States cannot tax a state municipal corporation,[2] or the emoluments of a state official,[3] or the process of state courts,[4] or documents in such a way as to exclude them from being received in evidence in state courts;[5] or even a railroad owned by a state.[6] On the other hand, a state cannot tax the bonds or notes issued by the United States,[7] or a bank chartered by the United States as a business agency,[8] or securities of the United States even though held as part of the capital of a bank,[9] or the incomes of officers of the United States.[10] State taxation, however, is not precluded by the fact that an institution or thing taxed is one from which the United States government derives some incidental benefit;[11] though by virtue of the clause requiring uniformity such taxation if unjust could be avoided. Nor under the statute of 1864, regulating the relation of the government to the national banks, is the stock held by private persons in such banks exempt from taxation by the states, provided there be no discrimination against such banks.[12]

[1] See Ward v. Maryland, 12 Wall. 418.

[2] U. S. v. R. R. Co., 17 Wall. 322.

[3] The Collector v. Day, 11 Wall. 113.

[4] Moore v. Quick, 105 Mass. 49.

[5] That this is the prevalent and better opinion see Whart. on Ev., § 697; *contra* Pomeroy's Const. Law, 185. That a person who under a law of congress is licensed to sell spirituous liquors in Massachusetts is controlled by the prohibitory legislation of that state see Mc Guire v. Com., 3 Wall. 387.

[6] Georgia v. Atkins, 1 Abb. U. S. 29.

[7] Bank Tax Case, 2 Wall. 200; Bank v. Supervisors, 7 Wall. 26.

[8] Osborn v. Bank, 9 Wheat. 738; see Weston v. Charleston, 2 Pet. 449.

[9] Bank of Commerce v. New York, 2 Black, 620; Bank Tax Case, 2 Wall. 200.

[10] Dobbins v. Commissioners, 16 Pet. 435.

[11] Railroad v. Peniston, 18 Wall. 5.

[12] Utica v. Churchill, 33 N. Y. 161; S. C. tit. Van Allen v. Assessors, 3 Wall. 573; People v. Commis., 4 Wall. 244.

In Boyer's Appeal, 13 Weekly Notes, 269 (Sup. Ct. Penn. 1883), it was held that shares in national banks could be taxed in the hands of individuals for county, municipal, and local purposes, provided that such taxation be uniform and of the same degree and character as that to which similar capital in state institutions is taxed. But "no discrimination against the capital invested in national banks can be allowed." Gordon, J., ibid., citing People v. Weaver, 100 U. S. (10 Otto) 539.

"The case of People v. Weaver, 100 U. S. 539, decided by the supreme

§ 410. The power of taxing imports being exclusively vested in congress, any state tax on imports in bulk, to attach before

court, respecting the taxation of shares of the national banks, may be cited in this connection. Without the permission of congress, the shares of these banks could not be taxed by the states. Congress gave the permission on condition that the taxation should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state, and that the shares owned by non-residents of the state should be taxed at the place where the bank is located. Rev. St., § 5219. In the case cited the court held, with regard to such taxation:—

"(1) That the prohibition imposed by congress against discrimination had reference to the entire process of assessment, and included the valuation of the shares as well as the rate of percentage charged; (2) that a statute of New York which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital, was in conflict with the prohibition, although the same percentage on such valuation was levied; and (3) that a statute which permitted a party to deduct his debts from the valuation of his personal property, except so much as consisted of those shares, taxed the shares at a greater rate than other moneyed capital.

"In the case of the Evansville Bank *v.* Britton, decided at the last term of the supreme court, the doctrine of the Weaver Case was affirmed, and it was held that the taxation of shares in the national banks, under the revenue laws of Indiana, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, which was allowed in the case of other investments of moneyed capital, was a discrimination against the act of congress and illegal. 105 U. S. 322." Field, J., R. R. Tax Cases, 13 Fed. Rep. 736.

In Second Nat. Bank of Titusville *v.* Caldwell, 13 Fed. Rep. 429, it was held by Acheson, D. J., that a license tax imposed by city ordinance upon a national bank, being a tax upon the operations of the bank, and a direct obstruction to the exercise of its corporate powers, is unconstitutional; but the ordinance not undertaking to make the tax a lien, and giving an action of debt only for its collection, the bank is not entitled to equitable relief by injunction.

That a state may tax property held by a citizen in registered bonds of another state, see Bonaparte *v.* Tax Court, 104 U. S. 592; *infra*, § 417 *a*; *supra*, § 260.

The fact that a railroad corporation is employed by the Federal government as a common carrier, does not exempt it from state taxation. Santa Clara *v.* R. R., 18 Fed. Rep. 385.

"When the instrumentality is the creation of the state,—a corporation formed under its laws,—and is employed or adopted by the general government for its convenience, although to enlarge its use and render it more available additional privileges and benefits are conferred by that government upon the corporation, it remains subject to the taxing power of the state, unless congress declares it to be exempt from such power. Congress can undoubtedly exempt any agencies it may employ for services to the general government from such taxation as will in its judgment impede or prevent their performance. Occasions may arise hereafter, especially in time of

the bulk is broken into parcels for sale, is unconstitutional.[1] The same reasoning applies to taxes on alien passengers arriving at a state port.[2] But a state law prohibiting the sale of spirituous liquors without a license is not unconstitutional;[3] nor is a state law imposing taxes on vessels for the benefit of infirm pilots.[4] The subject of discriminations as regulations of commerce is hereafter discussed.[5]

State statutes imposing taxes on imports and travel unconstitutional.

§ 411. It is in any view settled that a tax to secure a purely private end is unconstitutional. This has been held to be the case with a tax to repay parties losses they have incurred in a fire;[6] and with a tax to cover any other personal calamity.[7] But it does not follow that because a tax incidentally benefits a private person it is unconstitutional, since otherwise no tax could be sustained, as there is no tax which does not incidentally benefit some private person. The true distinction is thus stated by Judge Cooley: "When a law for the levy of a tax shows on its face the purpose to collect money from the people and appropriate it to some private object, the execution of the law may be resisted by those of whom the exaction is made, and the courts, if appealed to, will enjoin collection, or give remedy in damages if property is seized. But if a tax law on its face discloses no illegality, there can in general be no such remedy. Such is the case with the taxes levied under authority of congress; they are levied without any specifica-

Tax cannot be laid for merely private end, but the fact that a private end will be furthered will not vitiate tax for public purpose.

war, where the necessities of the Federal government will require such exemption of the roads of the companies, and of their franchises and appurtenances, to be declared and enforced; the exemption to continue until the necessities calling for it shall cease. But as yet congress has not declared any such exemption either of their property or of their franchises, and we therefore think that none exists." Field, J., Santa Clara *v.* R. R., 18 Fed. Rep. 389.

[1] Brown *v.* Maryland, 12 Wheat. 419; *infra*, § 421.

[2] Passenger Cases, 7 How. 253; Guy *v.* Baltimore, 100 U. S. 434; *infra*, §§ 421 *et seq.*

[3] License Cases, 5 How. 504.

[4] Cooley *v.* Board of Wardens, 12 How 299; *infra*, § 424.

[5] *Infra*, §§ 418 *et seq.* That a state has a right to impose license fees on ferries running to another state, see Wiggins Ferry Co. *v.* St. Louis, 107 U. S. 365; see *infra*, § 420.

[6] Lowell *v.* Boston, 111 Mass. 454.

[7] See Gage *v.* Busse, 7 Ill. App. 433.

tion of particular purposes to which the collections shall be devoted, and the fact that an intent exists to misapply some portion of the revenue produced, cannot be a ground of illegality in the tax itself. In cases arising in a local government, an intended misappropriation may sometimes be enjoined; but this could seldom or never happen in case of an intended or suspected misappropriation by a state or by the United States, neither of them being subject to the process of injunction. The remedies for such cases are therefore political, and can only be administered through the elections."[1]

Power to tax involves power to establish tax machinery.

§ 412. There can be no taxation without machinery; and hence the power to tax involves the power to provide by law for the appointment and supervision of whatever officials are necessary for the collection and proper care of taxes. A statute, however, prescribing the mode of collecting a tax must be strictly followed.[2]

Congress has discretion as to objects, but not as to particular persons.

§ 413. It does not follow, as we have seen, from the injunction as to uniformity, that congress is bound to undertake the difficult task of distributing the burdens of the land equally on the basis of population, nor the still more difficult task of making such distribution equal on the basis of wealth. The first would be glaringly unjust, as it would impose on the poor man the same burden of taxation as on the rich. The second would be oppressive and odious, making it necessary to arm the government with inquisitorial powers, often subjecting unproductive property to ruinous burdens, and putting on the same basis, persons whom a wise humanity would, at least to some extent, exempt from taxation, and persons whose redundancy of wealth is swollen by the protection government affords.[3] Since, therefore, taxation cannot be divided absolutely *pro rata* on the basis of either population or wealth, some mode of discrimination must be devised. Duties on *imports* are classified

[1] Cooley on Taxation, 541, 572, cited in Cooley on Constitutional Law, 59, 60.

[2] See Parker *v.* Overman, 18 How. 137.

[3] That a discretionary power as to objects of taxation is vested in congress, see argument of Marshall, C. J., in Providence Bank *v.* Billings, 4 Pet. 514.

in what is called a tariff, in which each article likely to be imported is noted either specifically or generically, and a duty assigned to it either arbitrarily or in proportion to its value. In settling *excises* the only way of avoiding an arbitrary *pro rata* imposition, which, as has been noticed, would be impracticable, is the selection of certain objects of taxation; and such selection, provided it does not pick out particular individuals for either favor or disfavor, does not conflict with the constitutional limitation as to uniformity. Thus, tobacco has been subjected to a heavy excise, it being a supposed luxury, though the imposition bears with peculiar hardness upon the agricultural interests in Virginia; while tea is admitted free of duty, and there never has been an attempt to lay an excise on breadstuffs. The income-tax, also, discriminated between large and small incomes, the latter, under a fixed range, being relieved from the burden. Exemptions from taxation, also, when the object is not to favor or disfavor individuals, but to effect some public benefit, have never been regarded as conflicting with the limitation as to uniformity either in Federal or in state constitutions. Such exemptions are made for the relief not only of persons of small means, so far as to protect their implements of support, and sometimes other property to a certain limit, from being seized for taxes,[1] but of nascent industries,[2] of railroad enterprises in their infancy,[3] of public charitable foundations,[4] of cemeteries,[5] of buildings for religious worship,[6] and of school property.[7]

[1] German Savings Bank *v.* Archbold, 15 Blatch. 398; Smith *v.* Osburn, 53 Iowa, 474.

[2] Welch *v.* Cook, 97 U. S. 541; State *v.* Northern Belle Co., 13 Nev. 250.

[3] Railroad Companies *v.* Gaines, 97 U. S. 697; Morgan *v.* Louisiana, 93 U. S. 217; Railway Co. *v.* Loftin, 98 U. S. 559; Wilson *v.* Gaines, 3 Tenn. Ch. 597.

[4] Donohugh's Appeal, 86 Penn. St. 306; Burd Orphan Asylum *v.* Darby, 90 Penn. St. 21; Library Association *v.* Pelton, 36 Ohio St. 253; Appeal Tax Ct. *v.* St. Peter's Academy, 50 Md. 321.

[5] Appeal Tax Ct. *v.* Balt. Cem. Co., 50 Md. 432; People *v.* Graceland Co., 86 Ill. 336; Mulroy *v.* Churchman, 52 Iowa, 238.

[6] Redemptorist Fathers *v.* Boston, 129 Mass. 178; see Old South Society *v.* Boston, 127 Mass. 378; State *v.* Axtell, 41 N. J. L. 117.

[7] University *v.* People, 99 U. S. 309; St. Joseph's Church *v.* Providence, 12 R. I. 19; Appeal Tax Ct. *v.* St. Peter's Academy, 50 Md. 321; Red v. Johnson, 53 Tex. 284. That perfect uniformity of taxation is unattainable, see New Orleans *v.* Davidson,

§ 414. Not only, therefore, is absolute uniformity in the distribution of taxes impracticable, but there is no school of statesmen, no matter how strict may have been their theories of construction, who have not advocated exemptions—*e. g.*, those of educational institutions, of ships, and of laborers, in respect to their implements of labor—which are inconsistent with such absolute uniformity. If, therefore, congress is entitled, in moulding taxes and in selecting objects of taxation, to discriminate in favor of the shipping and educational interests, and of persons whose power of self-support a harsh application of the right would destroy, it is also entitled to discriminate in favor of domestic manufactures. It is just as consistent with the limitation requiring uniformity to say "this growing manufacture shall be protected by putting a duty on foreign competing productions," as it is to say "this railroad or this school shall be exempt from taxation either for a time or permanently." So far, therefore, as the question of intention goes, a duty imposed on a foreign commodity is not unconstitutional, because the intention in laying it was in part the protection of home manufacture. And the reasons are twofold. In the first place, as is above stated, no taxation can be absolutely uniform, and the best that the legislature can do is to distribute taxation in such a way as to promote the general welfare of the community. And this congress is entitled to do by the very limitation before us. Whether protection in particular cases is expedient is a question of policy of which congress is to judge. But that there is a constitutional right to shape a tariff so that while producing an adequate revenue it may incidentally protect, there ought to be no question. In the second place, even were it to be held that granting protection to domestic industries is not *per se* within the range of the powers of the general government, it could not be maintained that the exer-

Collateral intent to protect does not vitiate tax.

30 La. An., Part I. 541. As to exemption of railroad property see further Hoge *v.* Railroad, 99 U. S. 348; Railroad Co. *v.* Commiss., 103 U. S. 1; Dickerson *v.* Yetzer, 53 Iowa, 681; Chicago R. R. *v.* Crawford, 48 Wis. 666; Macon R. R. *v.* Goldsmith, 62 Ga. 463. As to modified exemption of soldiers, see People *v.* Brooklyn, 18 Hun, 386. As to placing special taxes on absentees, see Williams *v.* Wayne Co., 78 N. Y. 561.

cise of a rightful power is vitiated by the fact that in exercising such power congress had incidental protection in mind. In advocating an embargo, both Mr. Jefferson and Mr. Madison argued that its effect would be to develop our home resources; yet this did not make the embargo unconstitutional. In advocating the improvement of the Mississippi River, and the removal of bars from our southern harbors, Mr. Calhoun argued that the effect would be to draw into activity industries otherwise dormant; yet the purpose of effecting this collateral benefit, which the constitution does not specify among the objects of Federal interposition, did not make unconstitutional statutes to improve the Mississippi, or to render navigable our harbors. The principle is incontestable, and runs through all our jurisprudence. A contract to do a legal act is not vitiated by the fact that the parties may at the time of contracting have had some illegal result incidentally in view.[1]

§ 415. It is not so, however, as to duties imposed avowedly for the purpose of prohibition. It is true that it has been held that a duty imposed on an article for the declared purpose of raising revenue cannot be treated as unconstitutional simply because it turns out to be so high as to prohibit, and hence to prevent any revenue from coming in from the peculiar article; the reason given being that the supreme court cannot assail the motives of congress by ascribing an intention to destroy revenue to a measure whose avowed object was the raising of revenue.[2] It is true, also, that Judge Story, in his Commentaries, broadly declares that "the absolute power to levy taxes includes the power in every form in which it may be used, and for every purpose to which the legislature may choose to apply it. It therefore includes the power to levy protective duties, though the duties may in effect be prohibitory."[3] But these positions cannot stand together. A tax, as we have seen, is an imposition laid by a sovereign on a subject for the purpose of revenue. A prohibitory duty, therefore, cannot be a tax, when laid, not for revenue, but to prevent revenue. Congress, in respect to the clause

But not when duties are prohibitive.

[1] Whart. on Cont., §§ 337, 346.

[2] Veazie Bank v. Fenno, 8 Wall. 533.

[3] Story, Const., § 965.

before us, stands in the position of an agent who has assets placed in his hands, first to pay debts, and then to distribute according to a fixed scheme. This undoubtedly gives large discretionary powers to the agent so entrusted. It would not authorize him, however, to destroy any of the property placed in his hands for such distribution. It must be remembered that a citizen of the United States is, apart from the question of revenue, as much entitled to buy an article produced abroad as he is to buy an article produced at home. He holds both rights subject to the superior right of the government to come in and require him to pay, in case of a purchase, a *pro rata* part of the price as a contribution to the revenue of the state. But because the government has the right to exact this tax, this does not give it the right to prevent the thing from which the revenue is raised from being sold at all. If the government, in other words, has the right, because it can tax foreign articles, of preventing foreign articles from being sold, it has the right, because it can tax domestic articles, of preventing domestic articles from being sold. If, for instance, it can say "I can tax soap made abroad, therefore I can exclude such soap from New York," it can also say, "I can tax soap made in this country, therefore I can stop the sale of such soap everywhere in the land." If, however, it cannot stop the sale of home goods under the guise of taxation, neither can it stop the sale of foreign goods under the guise of taxation. Nor can the plea of taxation be set up to justify any legislation the object of which is to destroy revenue. A power to an agent, for instance, to run a ship on any voyages he may deem best, does not authorize him to destroy the ship: a power to an agent to lease a house to any parties he may approve, does not authorize him to burn the house. The same observations may be made on the vindication of prohibition on the ground of regulating commerce. To destroy is not to regulate; and if the power to regulate commerce with foreign states authorizes the exclusion of foreign articles from the market, the power to regulate commerce between the states would authorize the exclusion of domestic articles from the market. On two grounds only can such prohibitions be defended. One is police or quarantine; the other is the exercise of the war power of

the government, by way of embargo, or by way of the exclusion of articles contraband of war.

§ 416. The next clause of the first article of the constitution gives congress the power to borrow money on the credit of the United States. This power includes the power to give proper securities, in the shape of bonds or notes for the payment of loans; and such securities, as we have seen, are exempt from state taxation.[1] Whether such securities, when not redeemable in cash, can be made legal tenders, will be hereafter discussed.[2]

Congress, in borrowing money, may give any proper securities.

§ 417. As the function of borrowing can only be exercised through agencies, it is within the discretion of congress to select as borrowing agents any officers it may deem proper to effect this purpose. It is, therefore, within the power of congress to charter a bank to whom is committed the function of borrowing money for the support of the government and of negotiating government bonds,[3] and also to employ for this purpose banks already in existence. It is on this reasoning that the constitutionality of statutes employing national banks as the agents for the distribution of bonds may be sustained. How far this power involves the power to charter a national bank as a discounting agency, has been gravely questioned. A power to borrow, so far from including, is, by its enumeration, exclusive of a power to lend; and the distinction is material, since, while a government, in order to equalize its expenditures, is compelled, in periods of extraordinary outlay, to borrow, there is no reason why it should enter the market, either in person or through an agent, as a lender. It may be that in certain great crises of government a bank is the only agent by whom money can be borrowed; and it may be that without the power of discounting, a bank cannot exist. On this ground the approval, by Washington and Madison, of charters of the Bank of the United States may be explained; and the affir-

Borrowing implies the right to borrow through a bank.

[1] *Supra*, § 408; Bank *v.* Supervisors, 7 Wall. 26.

[2] *Infra*, §§ 443 *et seq.*

[3] McCulloch *v.* Maryland, 4 Wheat. 316.

mation of the constitutionality of the charter by the supreme court of the United States followed, for the reason that the question, being one as to the selection of means to execute a power expressly given by the constitution, was one of political expediency, of which congress is the judge.

States may tax generally.

§ 417*a*. The power of a state over its domiciled citizens enables it to tax debts due them from persons in other states, subject to the restrictions in the Federal constitution; and as a state may impose any taxes on its domiciled citizens which its constitution permits,[1] it may tax the registered bonds of other states held by such citizens.[2] Some of the restrictions on the power of the state in this relation have been already noticed.[3] But a state, as we have seen, cannot tax Federal assets or Federal functions.[4] Nor can a state, under the fourteenth amendment, impose taxes unequally bearing on corporations or individuals.[5]

V. Regulation of Commerce.

Power meant to secure freedom of trade between the states.

§ 418. We have next to consider the following clause: "Congress shall have power . . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." To this the following qualification is attached: "No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties to another." No clause in the constitution is more distinctively produced by national conditions than this. The lines between the states were in most cases purely arbitrary. Free trade between the states was what the people of the states needed, and, as will presently be more fully seen, demanded. Natural conditions required that there should be interstate free trade; but local interests, striving to shut out competition, had, after the Revolution, induced the state legislatures to impose restrictions by which inter-

[1] Kirkland *v.* Hotchkiss, 100 U. S. 491.

[2] Bonaparte *v.* Tax Court, 104 U. S. 592.

[3] *Supra*, §§ 409–10. As to constituents of domicil, see *supra*, §§ 254 *et seq.*

[4] *Supra*, § 409.

[5] *Infra*, § 588.

state trade ceased to be free. Tariffs and harbor dues were followed by retaliations and general revenue impositions, the results of which were not only to break up interstate trade, but to engender animosities which might have resulted in war. We cannot study the debates in the constitutional convention without seeing that some of its members were students of political economy, and were aware of the importance of free trade among states occupying such a vast extent of territory with such varied productions as the United States. Nor can we study colonial history without seeing that however arbitrary were the restrictions placed on the colonies by Great Britain so far as concerned itself and the West Indies, they had, in colonial days, free business intercourse among themselves. If there had been alienations, these had been much softened by the Revolutionary struggle; if particular local interests sought a monopoly of some particular local market, this tendency was insignificant when compared with the desire of the people of the several states as a body for a free interchange of productions with each other. In fact, despite the arbitrary and capricious impositions of the legislatures, this freedom of intercourse still largely remained; and the feeling was universal that it should be formulated in the constitution. This fact, in connection with those noticed in the next section, must be taken into consideration in construing the clause now before us.[1]

§ 419. The territory embraced by the United States, it should be remembered in this relation, is marked at once by diversity and unity. It was bounded, when the constitu-

[1] The argument is thus put in a "note" given in Franklin's Works as published in London, July 7, 1767:—

"Suppose a country, X., with three manufactures, as cloth, silk, iron, supplying three other countries, A., B., C., but is desirous of increasing the vent and raising the price of cloth in favor of her own clothiers. In order to do this she forbids the importation of foreign cloth from A. A. in return forbids silks from X. Then the silk traders complain of a decay in trade. And X. to content them forbids silks from B. B. in return forbids iron ware from X. Then the iron-workers complain of decay, and X. forbids the importation of iron from C. C. in return forbids cloth from X. What is got by all these prohibitions? Answer. All four find their common stock of the enjoyments and conveniences of life diminished. B. F." Franklin's Works, ii. 366.

tion was framed, to the east by the Atlantic, and on its northern shores dwelt not only fishermen and sailors as intrepid and industrious as the world ever knew, but merchants of singular enterprise, and ship builders who were able to make the best use of the lumber with which the territory abounded. In the Middle States, and in Maryland and Virginia, the soil was sufficiently rich and extended to provide food for the whole seaboard; while in Pennsylvania were already discovered traces of the iron and coal with which her hills were in many districts enriched. The soil of Maryland and Virginia gave tobacco enough to satisfy the demand which was making it a prominent business staple. In the south, rice, which white labor could not produce, was freely obtained by the labor of negroes; and distinctive fruits and vegetables, which the Middle States could either not grow at all, or grew tardily and scantily, were readily raised. The west was but imperfectly explored; but it was known that there was to be found a vast territory where men of enterprising temper could find not only employment but wealth. There was diversity in soil, in climate, in occupation, and eminently in modes of labor. Yet with all this there was unity. The country, vast as it was, was insular. The Saint Lawrence, an estuary of great width for a long portion of its course, a river of resistless rapids for another portion, united with a chain of lakes which were inland seas, in separating it from Canada. To the east the country was bounded by the Atlantic, to the south by the Gulf of Mexico, to the west by the Mississippi, which separated it from a vast wilderness, which at that time was as much a natural barrier to the west as was the ocean to the east. Within these boundaries were all the resources necessary to national prosperity; and there existed in marvellous completeness natural highways by which these sections, diversified as they were, were knit together. To the Atlantic, on the east, descended navigable rivers which made the whole seaboard open to commerce. On the west, the Mississippi River, beginning its navigable course in Pittsburgh, formed a medium of communication between north, south, and west. We can

Diversity of climate, of soil, and of population, in the United States demand such freedom.

understand, therefore, how the movement towards absolute free trade between the states should have been so instinctive and imperative that all interests in the constitutional convention should have united in giving it effect.[1]

§ 420. Before the adoption of the constitution one of the chief objects of contention between the states was the control of navigable waters common to two or more states. Such waters formed the main avenues of commerce; and if state legislatures, under the promptings of local industries, were permitted to impede the navigation of such portions of such waters as were commanded by their shores, interstate commerce through these great avenues would be as much broken up as was the navigation of the Rhine by the robber chieftains of the middle ages. To stop these encroachments was essential; and the power to regulate commerce between the states gave congress ample power to move effectively in this direction. The question was raised before the supreme court of the United States for the first time in 1824, in a celebrated case which turned on a New York statute, giving to Robert R. Livingston and Robert Fulton, in consideration of the services of the latter in the introduction of steam, the exclusive right, for a term of years, to the steam navigation of all waters within the jurisdiction of the state. Gibbons, the plaintiff, undertook, notwithstanding this prohibition, to run between New York City and Elizabeth, in New Jersey, through New York Bay and the

State cannot close interstate waters.

[1] All parties concurred in this view. Thus Jefferson, in a letter to Monroe, dated Paris, June 17, 1785, said: "You will see that my primary object is to take the commerce of the states out of the hands of the states, and to place it under the superintendence of congress, so far as the imperfect provisions of our constitutions will admit, and until the states shall, by new compact, make them more perfect, I would say, then, to every nation on earth, by treaty your people shall trade freely with us, and ours with you, paying no more than the most favored nation, in order to put an end to the right of individual states, acting by fits and starts, to interrupt our commerce, or to embroil us with any nation." Bancroft's Hist. Const., i. 445. This was followed up by a letter of December 26, 1786, still more urgently pressing interstate free trade. These letters derive additional force from the fact that their object was to induce Monroe, then in congress, to take decided ground in this direction.

marginal waters of New York, a steamboat duly registered and enrolled as a coasting vessel. Ogden, who was the assignee of Livingston and Fulton, brought an action in a New York court to restrain Gibbons from running the boat within New York jurisdiction. This suit was sustained, and appeal was taken to the supreme court of the United States, where the ruling of the New York court was reversed, and it was held that the free navigation of the waters in question was essential to interstate commerce, and that the state of New York had no power, in view of the clause of the constitution before us, to grant an exclusive right to such navigation to the plaintiff's assignors.[1] In this case congress had in a measure occupied the ground by statutes authorizing the licensing of vessels for the coasting trade, the waters in question being indisputably part of the coast-waters of the United States, and the plaintiff having taken out a license under the statute. Chief Justice Marshall, however, did not place the case exclusively on this ground, arguing that the power of regulating commerce belongs exclusively to congress, and even though congress had not, as to a particular branch of commerce, exercised such power, any state action attempting such regulation was unconstitutional.—In 1829 the question as to navigable waters was presented in another phase.[2] The Blackbird Creek, in the state of Delaware, is, to adopt the description of Marshall, C. J., when giving the opinion of the court, "one of those many creeks passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance." It is not an avenue for interstate commerce, and in fact having no business mart at any point on its banks, it is not an avenue for any kind of commerce. The state of Delaware, for the purpose, as was declared, of reclaiming marsh land by the side of the creek, and relieving the inhabitants from diseases supposed to be engendered by the constant saturation of the soil by inundation, chartered a corporation, the Blackbird Creek Company, with authority to bank in the creek and to dam its waters when necessary to secure the embankment. This, however,

[1] Gibbons *v.* Ogden, 9 Wheat. 1.

[2] Wilson *v.* Blackbird Creek Co., 2 Pet. 245.

impeded the navigation of the creek; and Wilson, the owner of a sloop licensed and enrolled under the United States statutes, in endeavoring to run his sloop up the creek, broke into and injured the dam. He was sued by the company for damages, and set up as a defence the unconstitutionality of the Delaware statute. The supreme court of the United States, however, before whom the case ultimately came, held the statute constitutional.[1]—The Wheeling Bridge Case (1851) came next. The Ohio River begins to be navigable at Pittsburgh, and carries the coal and manufactures of Western Pennsylvania to New Orleans and the Gulf of Mexico. The state of Virginia incorporated a company to build a suspension bridge over the river at Wheeling; and there was no question that such a bridge would affect the use of the river for Pennsylvania produce. The state of Pennsylvania brought a suit in the supreme court of the United States to have the bridge abated as a nuisance.[2] There had been no legislation by congress making the Ohio River a public highway, or in any way precluding its obstruction. The court, nevertheless, held that the river was such a highway, and that a state statute authorizing its obstruction was unconstitutional, Taney, C. J., and Daniel, J., dissenting on the ground that unless congress took action as to bridges on the river, the matter was open to state legislation. The decree of the court was that the bridge was to be removed unless it was raised to such a height as to permit the passage of steamers at all stages of the water. Subsequently, however, congress having passed a statute authorizing the continuance of the bridge in its

[1] "The value of the property on its banks," said Marshall, C. J., speaking of the creek, "must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by the act stops a navigable creek, and must be supposed to abridge the rights of those accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and the citizens, of which this court can take no cognizance."

[2] Pennsylvania v. Wheeling Bridge Co., 13 How. 519.

then condition, the court held that as the matter was within the jurisdiction of congress, further objections on the part of Pennsylvania to the bridge could not be sustained.[1]—In the same line may be placed a subsequent decision holding unconstitutional a statute of Alabama requiring the owners of steamboats running on the waters of that state to file, before leaving the port of Mobile, a statement specifying the names and interests of the owners.[2] Aside, however, from the fact that congress had already legislated on the subject of license of coasting and merchant vessels, it must be remembered that Mobile is, next to New Orleans, the most important port on the southern coast of the United States, and that through it the foreign trade of several states is largely carried, while it forms, through the Alabama rivers, the centre of the business activity of a large population, not only in Alabama, but in the states to the north.—The next case to be mentioned, and one which deepens the distinction already noticed between waters which are the avenues of interstate trade and waters which are used merely for local purposes in a particular state, is one which relates to the bridging of the river Schuylkill. That river is exclusively in the state of Pennsylvania, and is not navigable for more than seven miles from its mouth, where its waters are arrested by a dam by means of which, in connection with what are called the Fairmount Water Works, the city of Philadelphia is supplied with water for household and manufacturing uses. Immediately south of the dam there have always been bridges, uniting the eastern with the western parts of the city of Philadelphia. To the south of the lowest of these bridges the plaintiff was carrying on the coal trade on wharves which were accessible to small steamers and tugs, by which, with barges, coal was largely transported. This trade, however, was likely to be interfered with by a new bridge which the city of Philadelphia was authorized by the legislature of Pennsylvania to erect to the south of the plaintiff's wharves, and, therefore, between these wharves and the mouth of the river. Congress had by

[1] Pennsylvania v. Bridge Co., 18 How. 421.

[2] Sinnot v. Davenport, 22 How. 227; see Foster v. Master, etc., 94 U. S. 246.

statute made the city of Philadelphia the port of entry for the district of Philadelphia, including "all the shores and waters of the river Delaware, and the rivers and waters connected therewith, lying within the state of Pennsylvania," and might, therefore, be claimed to have taken control of the navigation of the river Schuylkill. The plaintiff's application to enjoin the city of Philadelphia from building the bridge, however, was held by the majority of the supreme court to be made on insufficient ground, the reason given being that congress had not by statute prohibited the states from making bridges over navigable rivers entirely within their own domains.[1] Whatever we may think of this reasoning, the fact that the decision was also declared to be based on the precedent established by Wilson *v.* Blackbird Creek Company enables us to regard as settled the distinction there indicated between waters entirely within a state and used primarily for state purposes, and waters washing two or more states and used largely for interstate and foreign trade. Waters of the first class a state may obstruct or bridge for the benefit of its inhabitants, but not so with waters of the second class.—It may also be added that the ruling immediately before us may be placed on police grounds, since if the bridge in litigation was to be enjoined, the same reasoning would require the closing of the other bridges uniting the two sections of the city of Philadelphia, and the destruction of the Fairmount dam, by which that great city is supplied with water. In other words, where rivers are exclusively within state jurisdiction and are used mainly for state purposes, then they are subject to state regulation; when they are not exclusively within a particular state, and are highways of interstate and foreign commerce, then they are subject to the exclusive regulation of congress.[2]

[1] Gilman *v.* Philadelphia, 3 Wall. 713.

[2] See further, as showing in what cases navigable streams may be bridged, Jolly *v.* Bridge Co., 6 McLean, 237; Silliman *v.* Bridge Co., 4 Blatch. 74, 395.

"When a stream, navigable for the purposes of foreign or interstate commerce, is obstructed by the authority of a state, such exercise of authority may be valid until congress shall see fit to intervene. The authority of congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it

The most recent case on this important topic is that of the East River Bridge, decided by the supreme court of the

shall deem it proper to do so." R. R. Co. *v.* Fuller, 17 Wall. 560.

In Pound *v.* Turck, 95 U. S. 459, the supreme court sustained the validity of a statute of Wisconsin which authorized the construction of a dam across a navigable river wholly within its limits. In this case it was said by Miller, J.: "In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures, when their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interests of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures."

In Transp. Co. *v.* Chicago, 99 U. S. 635, Strong, J., said: "It has long been held that navigable rivers wholly within a state are not outside of state jurisdiction so long as congress does not interfere. S. P., Heerman *v.* Beef Slough, etc. Co., 8 Biss. 334; U. S. *v.* Beef Slough, etc. Co., id. 421; and U. S. *v.* New Bedford Bridge, 1 W. & M. 401. It has been consequently held that the state of Illinois has authority, there being no act of congress forbidding it, to construct locks and dams upon the Illinois River. Huse *v.* Glover, 15 Fed. Rep. 292.

In Escanaba Transp. Co. *v.* Chicago, 107 U. S. 678, the plaintiff in error, a transportation company created under the laws of Michigan, complained of a bridge across the Chicago River, and of certain regulations of the Chicago City Councils providing for the closing of the drawbridge between certain hours and at certain intervals. These regulations were reasonable in themselves and necessary to the city traffic. It was ruled by the supreme court that in the absence of legislation of congress, a state has full power to legislate in regard to the rivers within its borders, and also to exercise all necessary police regulations. This latter power embraces the construction of roads, canals, and bridges, etc., and it can be exercised more wisely by the states than by a distant authority. It was ruled, also, that where the state's power is exercised so as unnecessarily to obstruct the navigation of a river, congress may interfere and remove the obstruction, and in such a conflict the state must yield to the general government.

Congress having exercised its power to regulate commerce on the Mississippi River, has exclusive jurisdiction thereof. Railway Co. *v.* Renwick, 102 U. S. 180.

The United States, however, have not exclusive jurisdiction of suits *in personam* growing out of collisions between vessels navigating the Ohio River. Schoonmaker *v.* Gilmore, 102 U. S. 118.

In Pacific Coast Steamship Co. *v.* Board of R. R. Com., Cir. Ct. Cal. 1883, 18 Fed. Rep. 10, it was held by Field

ited States in November, 1883.[1] In that case it appeared t the legislature of New York, in 1867, authorized a dge over the East River, at the elevation of 130 feet ve high tide, with a provision that the free navigation of river should not be obstructed. In 1869 congress passed act to establish a bridge across the river named, which lared that a bridge constructed as provided by the statute New York referred to should be a lawful structure, pro-ed it should not obstruct, impair, or injuriously modify navigation of the river, and directed the secretary of war examine and determine if it did so. Subsequently the retary of war approved of a bridge which should not be than 135 feet above high tide. The bridge erected was less than 135 feet above high tide. It was held by the reme court of the United States that the bridge was not un-ful, and that a property-owner along the river, though ured in his property or business thereby, was not entitled an injunction restraining its completion or maintenance.

Sawyer, JJ., that the California e Board of Railroad Commissioners no power to regulate or interfere the transportation of persons or handise, by a steamship company, een ports within the state, if they n transit to or from other states, hen in navigating the ocean the el goes beyond a marine league the shore. "With respect," said l, J., "to purely domestic com-e carried on by these vessels, the nissioners possess all the authority h the state can confer. But when the vessels, in carrying persons merchandise between different in the state, be held to be en-d in commerce purely domestic? here is a commerce within the which does not come within that nation. We answer that they are so engaged when they take up ns or merchandise to carry to a nation within the state from a without it, or they take up per-sons or merchandise in a state to carry to a place without its limits. This is the purport of the decision of the su-preme court in the case of the Daniel Ball, 10 Wall. 557.

"Nor are the vessels engaged in purely domestic commerce when their voyages between ports of the same state require them to navigate the ocean. When they go beyond the marine league they pass out of the jurisdiction of the state, and come under the exclusive control of congress. To bring the transportation within the control of the state, as part of its do-mestic commerce, the subject trans-ported must be within the entire voy-age under the exclusive jurisdiction of the state. Lord *v.* Steamship Co., 102 U. S. 541."

That a state may regulate interstate ferries, see Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; ~~72 Mo. 90~~; 102 Ill. 56 *infra*, § 427; *supra*, § 410.

[1] Miller *v.* N. Y., 29 Alb. L. J. 30.

opinion of the court, as given by Field, J., thus states law: "The case of Gilman *v.* Philadelphia[1] is much nger than the Wheeling Bridge Case, and is conclusive inst the pretensions of the plaintiff. It there appeared t a bridge was about to be built over the Schuylkill River Chestnut Street in the city of Philadelphia, under the authority of an act of the legislature of Pennsylvania, when a rty owning valuable coal wharves just above Chestnut reet filed a bill to prevent its erection, alleging, as in the resent case, that it would be an unlawful obstruction to the avigation of the river and a public nuisance, inflicting upon im special damage, and claiming that he was entitled to be protected by an injunction to restrain the progress of the work, and to a decree of abatement should it be completed. The river was tide water and navigable to the wharves of the plaintiff by vessels drawing from 18 to 20 feet of water; and for years commerce to them had been carried on in all kinds of vessels. The bridge was to be only 30 feet high and without draws, and, of course, would cut off all ascent above it of vessels carrying masts. The city justified its intended action under the act of the legislature, setting up that the bridge was a necessity for public convenience to a large population residing on both sides of the stream. The court below dismissed the bill, and this court affirmed its decree, holding that, as the river was wholly within her limits, the state could authorize the construction of a bridge until congress should by appropriate legislation interfere and assume control of the subject. In giving its opinion, the court observed that it should not be forgotten that bridges which are connecting parts of turnpikes, streets, and railroads are means of commercial transportation as well as navigable waters, and that the commerce over them may be greater than on the water; that it was for the municipal power to determine which should be preferred, and how far either should be made subservient to the other; and that this power could be exercised by the state until congress interfered and took control of the matter. All the considerations which governed the decision

[1] 3 Wall., 713.

of that case operate with equal, if not greater, force in the present case. In that case different parts of a city separated by a navigable water were connected by a bridge; in this case two cities thus separated are united. In that case the obstruction was complete and permanent to all vessels having masts; in this case the obstruction does not exist except to a limited class of vessels having high masts, and to them it is little more than a temporary inconvenience. In that case there was no approval of the structure by congress, except such as may be inferred from its silence; in this case there is its direct authorization of the bridge after a careful consideration of its effect upon navigation by a commission of distinguished engineers. In that case the bridge was held to be a lawful structure against all private parties, the Federal government alone having the right to object to the obstruction to the navigation of the river which it might cause and to remove it; in this case that government does not object, but approves and sanctions the structure; and the public benefit from it far outweighs any inconvenience arising from its interference with the navigation of the stream."

United States has exclusive power of regulating foreign and interstate commerce.

§ 421. The right to regulate commerce is not confined to giving to the United States the power of removing, by judicial process, any obstructions which impede the navigation of rivers used for interstate and international commerce. In 1827 the supreme court was called upon to determine the constitutionality of a statute of the state of Maryland requiring all importers of foreign goods by bale or package, and other persons selling the same by wholesale, to take out a license for which a fee was to be paid, or, in default of payment, a fine imposed.[1] It was objected to this statute that it conflicted with the provisions (1) as to imports, and (2) as to the regulation of foreign commerce. The court held that the second objection, at least, was fatal, and that the statute was unconstitutional as interfering with the importer's right to sell, and as usurping a prerogative belonging exclusively to congress. Under the same category fall what are called the

[1] Brown v. Maryland, 12 Wheat. 419.

assenger Cases,[1] in which the court pronounced unconstitutional a New York statute providing that the health officer of New York should be entitled to receive from every vessel arriving at port a fee for every steerage passenger for the support of a marine hospital. A state tax, also, on a bill of lading of goods transported on the high seas is unconstitutional.[2] In accordance with the same general principle, the supreme court has pronounced unconstitutional a statute imposing a license tax on persons who within the state deal with foreign produce, there being no tax on domestic produce,[3] and a statute requiring carriers transporting passengers into other states to provide equal accommodations for persons without regard to race, color, or former condition.[4] It is not neces-

[1] Passenger Cases, 7 How. 283; Smith *v.* Norris, ib. Judges McLean, Wayne, Catron, McKinley, and Grier united in holding the power of regulating commerce was in congress, and that "persons" were objects of congress. Taney, C. J., and Daniel, Nelson, and Woodbury, JJ., dissented. As affirming the text, see Henderson *v.* N. Y., 92 U. S. 259.

[2] Almy *v.* Cal., 24 How. 169.

[3] Welton *v.* Missouri, 91 U. S. 275.

[4] Hall *v.* De Cuir, 95 U. S. 485; see generally, Salzenstein *v.* Mavis, 91 Ill. 391.

That the restriction does not apply to embargoes and inspection laws, see *supra*, § 408. That a state statute which levies a tax on travellers leaving the state by public conveyance does not conflict with the limitation before us, see Crandall *v.* Nevada, 6 Wall. 35. But a state tax on freight taken up within the state and carried out of it, or taken up without and brought into it, is unconstitutional (Reading R. R. *v.* Pennsylvania, 15 Wall. 232); and so of a statute discriminating, as to license fees, between residents and non-residents. Ward *v.* Maryland, 12 Wall. 418. That mere police regulations are not regulations of commerce, see, further, Railroad Co. *v.* Fuller, 17 Wall. 560. And so as to regulations as to wharfage and port wardens, *infra*, § 424.

In Denver R. R. *v.* Atchison R. R., 15 Fed. Rep. 650, it was held that a provision in the constitution of Colorado forbidding local railroad discrimination is not unconstitutional. See State *v.* McGinnis, 37 Ark. 362; see *infra*, § 488.

State statutes as to sale of foreign produce are unconstitutional only so far as they discriminate against such produce. Welton *v.* Missouri, 91 U. S. 275; Tiernan *v.* Rinker, 102 U. S. 123.

That a state cannot discriminate against products of other states, see Guy *v.* Baltimore, 100 U. S. 434; Machine Co. *v.* Gage, 100 U. S. 676.

In Indiana *v.* Pullman Car Co. (16 Fed. Rep. 193) it was held that section 87 of the act of the legislature of Indiana of March 29, 1881, entitled "An act concerning taxation," imposing a certain proportionate tax according to distance travelled in Indiana on the gross receipts of foreign sleeping-car companies, conveying passengers to, from, and through Indiana, was unconstitutional.

"A state," said Gresham, J., "can regulate its internal commerce as it

sary, however, in order to subject articles to state taxation, that they should be unpacked and distributed by the original importers. They may be taxed when in bulk in the hands of the importers' transferee, if the title did not accrue till the goods were in port.[1]

§ 422. The power of regulating commerce may be exercised in the interior of a state as well as at its ports. As is else-

pleases, but no state can exclude from its limits corporations of other states, as carriers of passengers from state to state, nor can any state charge corporations, whether organized by its own laws or the laws of other states, for the privilege of engaging in commerce within its limits. If Indiana may exact 2 per cent. of the gross earnings of corporations organized under the laws of other states as a condition upon which they will be permitted to pass over its territory as carriers of passengers, of course it may exact more, and other states may make similar exactions. The right asserted in this case amounts to a restraint or regulation of commerce between the states, and its enforcement would render the protection of the Federal constitution unreal. If the tax is sustained, it is plain that it will ultimately fall upon the passengers, and become a tax upon them for the privilege of crossing the state." See Railroad Tax Cases, 13 Fed. Rep. 736; Brown *v.* Maryland, 12 Wheat. 411; Hall *v.* De Cuir, 95 U. S. 485; Welton *v.* Missouri, 91 U. S. 282; Webber *v.* Virginia, 103 U. S. 344.

As to statutes regulating fares, see *infra*, § 488.

So it has been held that a statute of Iowa fixing the maximum rate to be charged by railroad companies for carrying freight within the state is invalid, in so far as by its terms it applies to through shipments from points within the state to points without the state. Kasier *v.* R. R. (U. S. Cir. Ct. Iowa, Chicago Legal News, Nov. 3, 1883), 18 Fed. Rep., 151; S. P., Carton *v.* Illinois Cent. R. R. (Sup. Ct. Iowa), 59 Iowa [illegible], 13 N. W. Rep. 67.

In People of New York *v.* Compagnie Générale Transatlantique, 107 U. S. 59 (Sup. Ct. U. S. 1883), it was held that the statute of New York of May 31, 1881, imposing a tax on every passenger from a foreign country landing in the port of New York, who is not a citizen of the United States, and holding the vessel which brings him liable for the tax, is a regulation of commerce within the exclusive power of congress, and hence unconstitutional. It was further held that the tax is not relieved from this constitutional objection by the title of the statute declaring that it is in aid of a law called an inspection law, which authorizes passengers to be inspected with reference to their being criminals, paupers, lunatics, orphans, or infirm persons, liable to become a public charge.

It was held, also, that inspection laws, and the words imports and exports, as used in article I., § 10, clause 2, of the constitution, have reference to property and not to persons, and can have no reference to free human beings. This, it was argued, is apparent from the language of § 9 of the same article, where, as regards persons of the African race, the word migration is used in reference to carrying of free persons, and importation in regard to slaves. S. C., 20 Blatch. 296.

[1] Waring *v.* Mayor, 8 Wall. 110.

here noticed, goods in bulk in the hands of the transferee of an importer, may be seized as if in the importer's hands. Congress, also, may regulate commerce on railroads, which have become the avenues of interstate communication, and any attempts of particular states to compel such roads to discriminate against other states would be held unconstitutional.[1] So far as concerns interstate commerce, railroads now take, in a large measure, the place of rivers and seas; and so far as concerns interstate relations, it properly belongs to the Federal government to secure uniformity in a mode of transport, which, in the United States alone, is equivalent to transport in half the navigable waters of the entire globe.[2] Hence, a state statute is unconstitutional, and may be pronounced such by a Federal court, which discriminates, no matter how indirectly, against the citizens of

Commerce may be regulated on land.

In People *v.* Pacific Co., 8 Sawy. 640, 16 Fed. Rep. 344, it was held that a state statute prescribing a tax of 70 cents for each passenger coming to the states to test whether such passengers have leprosy is unconstitutional; and so as to a state statute discriminating against Chinese. Lin Sing *v.* Washburn, 20 Cal. 534.

In the Head Money Cases (Edye *v.* Robertson, 18 Fed. Rep. 135) it was held by Blatchford, J., that the act of congress of August 3, 1882 (22 St. at Large, 214), entitled "An act to regulate immigration," which levies a duty of 50 cents for every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States, to be paid to the collector of customs of the port to which such passenger shall come, by the master, owner, agent, or consignee of every such vessel, is a regulation of commerce with foreign nations, within the provisions of article I., § 8, of the constitution of the United States; and it was further held that the act was not unconstitutional as a capitation tax, nor as a tax not uniform.

As to discrimination in taxation, see *supra*, §§ 408–410.

That the power of congress extends to navigation of the high seas between the ports of the same state, see Lord *v.* Steamship Co., 102 U. S. 541.

That the power of regulating commerce is exclusively in congress, see Mobile Co. *v.* Kimball, 102 U. S. 691.

[1] The Clinton Bridge, 1 Woolw. 150.

[2] In 1790 railway communication was unknown. In 1882 there were 127,830 miles of railroad in the United States, while in the same year in Europe (including England) there were only 105,895 miles of railroad, all the railroads in the whole world containing 264,826 miles. On the other hand, in 1882 the shipping of the United States consisted of 4,165,933 tons, while that of Great Britain alone, in 1880, consisted of 6,344,577 tons. We must take the term "regulate commerce," therefore, in its general sense, not in the special sense which it received at a time when commerce was almost entirely by water.

other states.[1] A law, therefore, placing a tax on bills of lading for gold or silver imported into the state is unconstitutional;[2] and so of a tax discriminating against foreign carrier corporations;[3] and of a tax imposed on agents selling goods manufactured in other states;[4] and of a tax on sales of imported goods by auctioneers.[5] Nor will a state be permitted by statute to prevent telegraphs to advance state interests to the disparagement of other states.[6] When, however, there is no dis-

[1] Guy *v.* Baltimore, 100 U. S. 434.

[2] Almy *v.* Cal., 24 How. 169, see *infra*, § 426.

[3] Reading Railroad *v.* Pennsylvania, 15 Wall. 232; Erie R. R. *v.* State, 31 N. J. 531; *supra*, §§ 408. 410, 421.

[4] Webber *v.* Virginia, 103 U. S. 344; McGuire *v.* Parker, 32 La. An. 832; see Galveston Co. *v.* Gorham, 49 Tex. 279; *supra*, § 408.

[5] Cook *v.* Pennsylvania, 97 U. S. 566, and cases cited; *supra*, §§ 108, 110, 121; see Tiernan *v.* Rinker, 102 U. S. 123.

[6] See West. Un. Tel. *v.* Pac. Stat. Tel., 5 Nev. 102; 12 Op. Att.-Gen., 337. In Telegraph Co. *v.* Texas (105 U. S. 460; S. C., 4 Morr. Tran. 487), this is put on the ground that the telegraph company under Rev. Stat., tit. 65, is an agent of the United States. See Pensacola Tel. Co. *v.* West. Tel. Co., 96 U. S. 9; *infra*, § 446.

In Joseph *v.* Randolph (Sup. Ct., Ala., 1882, 16 Rep. 227) it was held that an Alabama statute imposing a license tax on all persons engaged in employing or inducing laborers to leave the state is unconstitutional. "There can be no denial," said Somerville, J., "of the general proposition that every citizen of the United States, and every citizen of each state of the Union, as an attribute of personal liberty, has the right, ordinarily, of free transit from or through the territory of any state. This freedom of egress or ingress is guarantied to all by the clearest implications of the Federal as well as of the state constitution. It has been said that even in England, whence our system of jurisprudence was derived, the right of personal liberty did not depend on any express statute, but 'it was the birthright of every freeman;' Cooley on Const. Lim., 342. This right was said by Sir Wm. Blackstone to consist in 'the power of locomotion, of changing situation, or of moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due process of law;' 1 Bl. Com., 134. For its summary vindication, when illegally molested, the writ of habeas corpus had its origin, and was established with Magna Charta; Hurd on Habeas Corp., 143. This liberty of interstate transit, thus based on the assertion of personal liberty, is referable to many clauses of the Federal constitution. In Ward *v.* Maryland (12 Wall. 418–430) it was classed by Mr. Justice Clifford as one of 'the privileges and immunities of the citizens of the several states,' guaranteed to the citizens of each state by art. 4, § 2 of the constitution of the United States. In the Passenger Cases (7 How., U. S. 283) it was recognized by a majority of the supreme court of the United States as a right protected by the commercial clause of the Federal constitution from hostile state legislation, and its existence was admitted by all and denied by none. Mr. Justice Wayne said that no state had the

crimination, then a state statute laying a tax which falls *pro rata* on goods imported from other states is not unconstitutional;[1] and so of taxes falling *pro rata* on all express companies;[2] and so of regulations as to floating of logs,[3] and the deposit of offal in the sea,[4] and of inspection laws.[5] Under the same head may be classed the rulings of the supreme court of the United States to the effect that a state may by statute fix the charges of interstate railroads, and other corporations engaged in interstate transport.[6]

Exceptions as to matters of necessarily local law.

§ 423. It has, however, been held that matters of distinctively local interest, such as pilotage, may be constitutionally left by congress under state control.[7] With this may be classed a subsequent ruling in which it was held that a state law forbidding persons to fish for oysters with a scoop or drag within the territorial waters of the state is constitutional, although the fishing was by the owner of a vessel enrolled and licensed under the laws of the United States.[8] The distinction was more generally expressed in a later case, in which it was held, that when state legislation goes to a matter in its essence national and general, it is an intrusion on the domain of congress, and therefore void;[9] but that it is otherwise as to matters local and municipal in charac-

right 'to tax a foreigner or person for coming into one of the United States.' 'That,' he continued, 'would be a tax or revenue act in the nature of a regulation of commerce, acting upon navigation,' and as such he thought it violative of the Federal constitution; Passenger Cases, *supra*. In Crandall *v.* Nevada (6 Wall. 35) the entire court concurred in the view that a capitation tax of one dollar, imposed by the legislature of Nevada upon every person leaving the state as a passenger by railroad, stage-coach, or other mode of conveyance, was unconstitutional and void."

[1] Woodruff *v.* Parham, 8 Wall. 123; Hinson *v.* Lott, 8 Wall. 148; *infra*, § 426.

[2] Reading R. R. *v.* Penns., 15 Wall. 232; 62 Penn. St. 286; Walcott *v.* People, 17 Mich. 68.

[3] Harrington *v.* Lumber Co., 129 Mass. 580.

[4] Mayor of N. Y. *v.* Furgueson, 23 Hun, 594.

[5] *Supra*, § 408.

[6] Munn *v.* Illinois, 94 U.S. 113; Union Pac. R. R. *v.* U. S., 99 U. S. 700, 719; Wabash R. R. *v.* People, 105 Ill. 236. A state, also, may require that railroad trains should stop at all county-seats. Chic. R. R. *v.* People, 105 Ill. 657; see *supra*, § 410; *infra*, § 480.

[7] *Infra*, § 424. As to police exclusions, see *infra*, § 424.

[8] Smith *v.* Maryland, 18 How. 71; see McCreedy *v.* Com., 27 Grat. 985; Boggs *v.* Com., Sup. Ct. Va. 1883.

[9] Welton *v.* Missouri, 91 U. S. 275.

ter, as to which congress, by non-action, adopts the local regulations.[1] Hence it is settled law that state regulations of commerce are not unconstitutional when they concern subjects "local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations," among which "may be mentioned harbor pilotage, buoys, and beacons to guide mariners to the proper channel to which to direct their vessels."[2] Unless, however, it is shown that a state law regulating trade is one of a purely local and municipal character, not affecting commerce with sister or foreign states, it is void, even though not conflicting with any legislation of congress.[3]

Quarantine laws under state power, and so of pilotage and wharfage.

§ 424. It is always within the power of a state to pass such quarantine laws as it may deem expedient to protect its citizens from the introduction of infectious disease.[4] The states, also, it is held, may constitutionally exercise the privilege of imposing compulsory pilotage on vessels entering their territorial waters.[5] But beyond its territorial waters the jurisdiction of a state in this relation cannot extend; nor should it

[1] See Hall v. De Cuir, 95 U. S. 485; Mobile v. Kimball, 102 U. S. 691.

[2] Field, J., Mobile v. Kimball, 102 U. S. 691.

[3] Railroad v. Husen, 95 U. S. 465; Chy Lung v. Freeman, 92 U. S. 275; as to trade-mark cases, see *infra*, § 450.

[4] See argument in Railroad Co. v. Husen, 95 U. S. 465; *supra*, § 179.

[5] *Supra*, § 423; Cooley v. Port Wardens, 12 How. 299; Wilson v. McNamee, 102 U. S. 572; The Georgia, 8 Ben. 392; The Charles A. Sparks, 16 Fed. Rep. 480, where it was held that where, by a statute of one state, vessels bound to a port of that state were free from the obligation of compulsory pilotage when not spoken outside of a certain line, such a statute has no application to pilot services tendered by a pilot licensed under the laws of another state situated on the same river. S. C., under name of Virden v. Brig Charles A. Sparks, 13 Weekly Notes, 300; S. P., "The Alzena," 13 Weekly Notes, 63; see Wilson v. Gray, 127 Mass. 98.

The act of congress of August 7, 1789, provided that, "All pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress." In Cooley v. The Board of Wardens (12 How. 299), the constitutionality of an act of Pennsylvania, passed March 29, 1803, establishing a pilotage system, was sustained as a

be permitted to exercise jurisdiction even over such territorial waters when they are the thoroughfares for interstate com-

valid exercise of the power of that state.

In the opinion of the court it was said: "The act of 1789 contains a clear and authoritative declaration by the first congress, that the nature of this subject is such that, until congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local, and not national; that it is likely to be the best provided for, not by one system or plan of regulation, but by as many as the legislative discretion of the several states should deem applicable to the *local peculiarities of the ports within their limits.*"

In consequence of the enactment by New Jersey of pilotage statutes, asserting for that state coördinate pilotage rights with New York, congress, on March 2, 1837, passed the following statute:—

"That it shall be lawful for the master or commander of any vessel coming into or going out of any port situated upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters, to pilot said vessel to or from said port; any law, usage, or custom to the contrary notwithstanding."

In 1881 Delaware passed a statute making it compulsory on all vessels (except coalers), "passing in or out of Delaware Bay, by the way of Cape Henlopen," to receive a pilot, and prescribing a penalty for the refusal. In The Clymene (9 Fed. Rep. 164) Delaware was held to have, under the act of 1789, coördinate pilotage rights with Pennsylvania and New Jersey, so far as concerns Delaware Bay. This decree was affirmed by Judge McKennan, on the ground that Delaware was under the act of March 2, 1837 (12 Fed. Rep. 346). In Hagar, *ex parte* (104 U.S. 520), an application to prohibit the Delaware District Court from enforcing a penalty of this class was refused on technical grounds. In The Alzena (13 Weekly Notes, 63, above cited), the right of a Delaware pilot to collect his fees in case of refusal to employ him was sustained by Judge Butler and Judge McKennan, although under the Pennsylvania statute pilotage fees in cases of that class (the vessel being at anchor in Delaware Bay before she was spoken by a pilot), were not to be exacted; aff. in the Charles A. Sparks, *ut sup.* See an interesting review of the cases in 17 Am. Law Reg., pp. 372 *et seq.*

"The jurisdiction of the local sovereign over a vessel, and over those belonging to her, in the home port, and abroad on the sea, is, according to the law of nations, the same." Hence, it was held that a pilot on a New York pilot-boat, though fifty miles at sea, was under New York jurisdiction. Wilson *v.* McNamee, 102 U. S. 572.

"Conceding that the pilot laws of the several states are regulations of commerce, Mr. Justice Story said: 'They have been adopted by congress, and without question are controllable by it.' . . . The long-continued silence of congress, with its plenary power, in the presence of such legislation by the states concerned, is itself an implied ratification and adoption; and is equivalent in its consequences to an express declaration to that effect." Swayne, J., Wilson *v.* McNamee, 102 U. S. 572.

"The rules to govern harbor pilotage must depend in a great degree upon

merce. Pilotage is distinctively a matter of port concern, and local laws, as to pilotage, should be limited to vessels entering the ports of the state imposing such laws. Hence, in any view, state statutes authorizing port wardens to demand fees from vessels arriving in port are constitutional.[1]—Though the states, as will be hereafter seen, are precluded from laying duties on tonnage, this only prohibits them from taxing vessels "as vehicles of commerce, according to capacity," it being conceded that they may be taxed *pari passu* with other property.[2]

§ 425. The clause before us does not preclude the states from exercising police jurisdiction on their shores and over navigable waters within their territorial bounds.[3] Perhaps under this head may fall the ruling above noticed to the effect sustaining the bridging and damming the river Schuylkill so as to make it best adapted to promote the comfort of the city of Philadelphia;[4] but be this as it may, there is no question that in this way may be justified the ruling of the supreme court, n 1837, affirming the constitutionality of a statute providing that every master of a vessel arriving at New York shall, within twenty-four hours, make a report in writing containing the names, ages, and last place of settlement of each passenger.[5] With this may be coupled the rulings (1847) in the License Cases,[6] in which it was held that it is within the police power of the states to prohibit the sale of spirituous liquors within their borders, and that so far as concerns goods received in bulk for inland use, such goods may, in any view, be subject to police restriction, provided there be no statute of

Does not exclude states from exercising police exclusion.

the peculiarities of the ports where they are to be enforced. It has been found by experience that skill and efficiency on the part of local pilots is best secured by leaving the subject principally to the control of the states." Field, J., Mobile *v.* Kimball, 102 U. S. 691.

[1] Steamship *v.* Port Wardens, 6 Wall. 31.

[2] *Infra*, § 430; Cooley, Const. Lim. 606.

[3] See U. S. *v.* De Witt, 9 Wall. 41; Sherlock *v.* Alling, 93 U. S. 99; Slaughter-house Cases, 16 Wall. 36.

As to taking property for police purposes, see *infra*, § 565.

[4] *Supra*, § 420.

[5] New York *v.* Miln, 11 Pet. 102; see Henderson *v.* N. Y., 92 U. S. 259.

[6] Thurlow *v.* Massachusetts, 5 How. 504; Fletcher *v.* Rhode Island, ib.; Peirce *v.* New Hampshire, ib.; Metropolitan Board *v.* Barrie, 34 N. Y. 666.

congress regulating such reception.[1] But under the head of police regulation cannot be classed a state statute excluding from the state all emigrants likely to be a public charge,[2] or who should not give bonds on landing.[3]

Nor does the restriction touch purely interstate transactions.

§ 426. It need scarcely be added that the power to regulate commerce does not authorize the United States to interfere with trade within the borders of a state except for the purpose of imposing a tax. And the only commerce that can be regulated under the clause is that with foreign nations or with a sister state. The fact that articles on which domestic labor is bestowed may be exported does not put their regulation in the hands of congress. "A pretension as far reaching as this would extend to contracts between citizen and citizen of the same state, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries, the mines, and furnaces of the country; for there is not one of these avocations the results of which may not become the subjects of foreign commerce, and be borne, either by turnpikes, canals, or railroads, from point to point within the several states, toward an ultimate destination."[4] "The inaction of congress to prescribe any specific rules to govern interstate commerce, when considered with reference to its legislation, with respect to foreign commerce, is equiva-

[1] In this point Taney, C. J., and Catron, Daniel, Nelson, and Woodbury, JJ., concurred.

[2] Chy Lung *v.* Freeman, 92 U. S. 275.

[3] Ah Fong, *in re*, 3 Saw. 144. As to head money and tax on emigrants, see *supra*, § 421.

That a state law prohibiting the sale of intoxicating liquors, with the exception of "cider and wine manufactured from fruits grown in this state," is not unconstitutional, see State *v.* Stucker, Sup. Ct. Iowa, 1882.

But a statute prohibiting the reception of spirituous liquors at a port is unconstitutional. License Cases, 5 How. 512, 574, 631.

As to laws prohibiting oyster dredging, see *supra*, § 423.

That a law restricting the sale of opium is not unconstitutional, see State *v.* On Gee, 15 Nev. 184; State *v.* Ah Sam, 15 Nev. 27; State *v.* Ah Chew, 16 Nev. 50; citing License Cases, 5 How. 504; Metropolitan Board *v.* Barrie, 34 N. Y. 666.

[4] Veazie *v.* Moor, 14 How. 568. In Trade-mark Cases, 100 U. S. 82, it was held that a Federal statute making it penal to forge trade-marks was unconstitutional, this being a matter of state concern.

lent to a declaration that interstate commerce shall be free and untramelled."[1]

§ 427. The clause, also, does not prohibit the states from establishing and regulating ferries on navigable waters.[2] Nor is a state precluded from improving navigable rivers within its boundaries, and imposing tolls for the use of such rivers.[3]

Establishing state ferries and river improvements not forbidden.

§ 428. The power of regulating commerce includes the power of moulding the liability of ship-owners and ship-officers on the high seas or on navigable waters. In 1851, in exercise of this power, congress passed a statute providing that no owners of vessels shall be liable for any damage to goods and merchandise on board the vessel in which the commodities are laden unless the loss occurred through the design or neglect of the owner himself. This act has been sustained by the supreme court.[4]

Power authorizes laws limiting liability of ship-owners.

§ 429. The power, also, extends to rivers which are tributary to inland lakes on which there is interstate commerce, and congress may take under its cognizance vessels and other vehicles of commerce used on such rivers for the purpose of delivering merchandise to vessels navigating the lakes.[5]

Power extends to rivers tributary to lakes.

§ 430. A state is also prohibited from laying, without consent of congress, any duty of tonnage.[6] Hence, statutes have been held unconstitutional which impose duties on vessels as vehicles of commerce,[7] or upon vessels in respect to their capacity.[8] But the prohibition does not extend to wharfage dues,[9] nor to taxation

Tonnage duties prohibited.

[1] Field, J., Tiernan *v.* Rinker, 102 U. S. 123; see *supra*, § 422.

[2] Conway *v.* Taylor, 1 Black, 603; U. S. *v.* The James Morrison, Newb. Ad. 241.

[3] Palmer *v.* Commissioners, 3 McLean, 226; Kellogg *v.* Union Co., 12 Conn. 7; Huse *v.* Glover, 16 Cent. L. J. 449; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; ~~49 Mo., 99~~; *supra*, §§ 410, 420. 102 Ill 560

[4] Moore *v.* Trans. Co., 24 How. 1.

[5] The Daniel Ball, 11 Wall. 557; The Montello, 20 Wall. 430.

[6] Const., art. I. § 10, cl. 3.

[7] Peete *v.* Morgan, 19 Wall. 581; Transportation Co. *v.* Wheeling, 99 U. S. 273.

[8] Cannon *v.* New Orleans, 20 Wall. 577; Inman St. Co. *v.* Tinker, 94 U. S. 238.

[9] Packet Co. *v.* Keokuk, 95 U. S. 80.

of interest in ships in the same way as of other interests, in conformity with the law of the place where owned.[1] It is otherwise as to a statute requiring all vessels of a certain class entering a port to pay a certain rate per ton.[2]

VI. Naturalization.

Congress has power to establish uniform naturalization.

§ 431. The next power given to congress, in the article before us, is "to establish a uniform rule of naturalization."[3] In its strict sense, naturalization is the adoption by a state as a citizen of a person born abroad. By this process an alien is relieved from the disabilities of alienship, with the exception that he cannot be elected president of the United States.[4] It should be remembered that expatriation is now internationally conceded; and that a temporary return, by a naturalized citizen, to his native land, does not revive his native allegiance.[5] The power to confer naturalization in the United States, it should be added, is exclusively in congress.[6]

Persons born in a state subject to its jurisdiction.

§ 432. By the fourteenth amendment to the constitution it is provided that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states in which they reside."[7] Whether a child born in the United States of alien parents is a citizen of the United States depends upon whether such child is "subject to the jurisdiction of the United States." The prevalent

[1] St. Louis *v.* Ferry Co., 11 Wall. 423. That wharfage may be constitutionally imposed, see *supra* § 424.

That wharfage is not tonnage, so far as it is a charge levied on vessels for the temporary use of wharves or landings, see Cannon *v.* New Orleans, 20 Wall. 577; Packet Co. *v.* Keokuk, 95 U. S. 80; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Oachita Packet Co. *v.* Aiken, 16 Fed. Rep. 890; Transportation Co. *v.* Parkersburg, 107 U. S. 691.

[2] Inman Steamship Co. *v.* Tinker, 94 U. S. 228. A municipal corporation, also, may constitutionally impose taxes for wharfage. Marshall *v.* Vicksburg, 15 Wall. 146; Packet Co. *v.* St. Louis, 95 U. S. 80; Packet Co. *v.* St. Louis, 100 U. S. 423.

[3] Const., art. I., § 8, cl. 4.

[4] *Supra*, §§ 177, 262; Whart. Conf. of Laws, § 5.

[5] Ib. § 6.

[6] Chirac *v.* Chirac, 2 Wheat. 259. That naturalization creates political status, see *supra*, § 262. Of the relations of naturalization and domicil, see *supra*, § 255.

[7] *Infra*, § 585; see *supra*, § 255.

opinion is to the negative; and hence, on the same reasoning, children born abroad of citizens of the United States are entitled to their parents' citizenship, with the right, however, in both cases, when the child reaches full age, of rejecting his parents' citizenship and electing the nationality of his actual birth.[1]

Naturalization results from annexation.

§ 433. It is not only by the formal process prescribed in the statute that naturalization can be worked. The mere fact of the annexation of a country naturalizes all subjects of the country in the country to which the annexation is made. Mere military occupation does not work such naturalization. It takes place, however, when an annexation is brought about by treaty, or by conquest assented to by the annexed state.[2]

Tribal Indians are not citizens.

§ 434. Indian tribes, under the constitution and laws of the United States, form, in the language of Marshall, C. J., "domestic dependent nations." Members of such tribes, when retaining their tribal relations, are not citizens of the United States, unless made so by its particular laws.[3] On the one hand, the United States government is sovereign over Indian territory unless included within state bounds.[4] On the other hand, the whole municipal government of the tribal Indians, in relation to each other, is vested in the tribes themselves, subject to the imposition of excise duties by the government of the United

[1] Whart. Conf. of Laws, § 10; see *supra*, §§ 177 *et seq.*, 255, 262. When an alien woman with a child marries a naturalized citizen, she and her child become thereby citizens. U. S. v. Kellar, 13 Fed. Rep. 82.

[2] See Minor v. Happersett, 21 Wall. 162; Justice's Opinion, 68 Me. 589; Crane v. Reader, 25 Mich. 303. In Tobin v. Walkinshaw, 1 McAl. 186, it was held that naturalized citizens owing an allegiance merely statutory were released therefrom by a transfer of the territory to another sovereign. See *supra* §§ 151 *et seq.*

[3] *Supra*, § 265; see Whart. Conf. of Laws, § 9; Paper by General Walker in International Review for May, 1874, pp. 321-9; 15 Am. Law Rev. 21.

Indians, as will be presently seen, are not made citizens of the United States by the reconstruction legislation, *infra*, § 585.

[4] *Supra*, § 26; U. S. v. Tobacco Factory, 13 Int. Rev. Rec. 91; 1 Dill., 264; 11 Wall., 616; Murch v. Turner, 21 Me. 535; Jackson v. Reynolds, 14 Johns. 335; and see 15 Am. Law Rev., 28-29.

States,[1] and to penal jurisdiction of offences in which both parties are not Indians.[2]

Chinese in the U. S. cannot be naturalized.

§ 435. By the naturalization statute of 1804, only white persons could be naturalized. When it was determined, during the late civil war, to confer full political privileges on the African race, a bill was introduced by Mr. Sumner striking out the qualification "white." This, however, excited the opposition of the Pacific states, who were opposed to the naturalization of the Chinese. To avoid this difficulty, the statute was finally shaped so as to confine the privilege of naturalization to "aliens being free white persons, and to aliens of African nativity, and to persons of African descent."[3] Under this statute it has been held that a Chinese is not entitled to naturalization.[4] And by the fifth article in the Burlingame treaty (ratified November 28, 1868, it is provided that "nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."[5] The bearing of the recent amendments on the Chinese will be hereafter considered.[6]

[1] *Supra*, § 26; U. S. *v.* Shawnees, 5 Chic. Leg. News, 352; Cherokee Tobacco Case, 11 Wall. 616.

[2] That a non-tribal Indian may be a citizen, see Rogers *v.* Quinney, 31 Wis. 62, and other cases cited *supra*, § 265; Whart. Conf. of Laws, § 9; 15 Am. Law Rev., 21.

That the Indians do not own the soil of their reservations, and cannot grant it away, see Cherokee Nat. *v.* Georgia, 5 Pet. 1.

The Federal acts of 1802 and 1834 provide for the punishment of crimes in Indian territory, not within state limits, when such crimes are not committed by an Indian or Indians. U. S. *v.* Yellow Sun, 1 Dill. 271, and cases cited Whart. Crim. Law, 8th ed. § 282*a*.

That the Federal government may punish crimes committed by white men on Indians and Indians on white men, see U. S. *v.* Martin, 14 Fed. Rep. 817; Whart. Crim. Law, 8th ed., § 282*a*.

In Crow Dog, *in re*, 1883, it was decided by the supreme court of the United States that the United States have not jurisdiction of the murder of one tribal Indian by another of the same tribe.

[3] Rev. Stat. 1875, § 2169; see Supple. Act, p. 1435.

[4] Ah Yup, 5 Sawyer, 155; State *v.* Ah Chew, 16 Nev. 50, 61; see *infra*, § 555.

[5] Whart. Con. of Law, § 12.

[6] *Infra*, § 585. In Pennsylvania, however, Chinese have been admitted to naturalization; see Dunne's Case, Philadelphia Times, August 19, 1883. That the act of May 6, 1883, excludes persons of Chinese race, though Eng-

§ 436. The question of alien civil disabilities is determined, not by the general government, unless in cases controlled by treaty, but by the particular states. As a general rule, an alien has the same privileges in resorting to the courts for redress and protection as has a citizen, though an alien, as a non-resident, may sometimes be obliged to give security for costs.[1] Aliens may take by purchase or succession land whose title comes from the Federal government, or is part of the distinctively territorial possession of that government; but their right to land within the borders of states was, under the old rule, determined by state law, unless overridden by treaty. When there is a treaty, permitting an alien from a particular country to hold real estate, this entitles an alien from such country to hold real estate in a state where this would otherwise be prohibited,[2] And under the fourteenth amendment, to be hereafter distinctively considered, a state "cannot deny to any person within its jurisdiction the equal protection of its laws;"[3] and this clause may abrogate state discriminations in this respect.

Aliens entitled to equal civil rights with citizens.

§ 437. "It is quite clear," says Miller, J.,[4] "that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics and circumstances in the individual.[5] A state may make whomsoever it chooses a citizen, but this does not make such person a citizen of the United States." "Previous to the adoption of the constitution of the United States every state had the undoubted right to confer, on whomsoever it pleased, the character of citizen, and to endow him with all its rights. But this character was confined, of course, to the boundaries of the state, and gave him

Citizenship of a state does not involve citizenship of the United States; and the converse.

lish subjects; see Ah Lung, *in re*, 18 Fed. Rep. 28; S. C., under name of Pong, *in re*, 17 Cent. L. J. 310; see *supra*, § 383; see, also, 17 Cent. Law J., 261.

[1] See *supra*, § 178.

[2] *Supra*, § 383; see Hauenstein *v.* Lynham, 100 U. S. 483; and see question fully discussed in Whart. Conf. of Laws, § 17.

[3] *Infra*, § 588.

[4] Slaughter House Cases, 16 Wall. 36.

[5] To same effect, see remarks of Waite, C. J., in U. S. *v.* Cruikshank, 92 U. S. 542.

no rights or privileges in other states, beyond those secured to him by the law of nations and comity of states. Nor have the several states surrendered the power conferring these rights by adopting the constitution of the United States. Each state may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons."[1] Particular states have availed themselves of this right by making non-naturalized foreigners citizens.[2] So, on the other hand, the inhabitants of a district within a state ceded to the United States are citizens of the United States, but not of the ceding state.[3] A distinction, however, has been taken between citizenship and the right to vote, and it has been held that the statutes conferring on aliens the right to vote do not necessarily make them citizens.[4]

VII. Bankruptcy.

Congress has power as to bankruptcies.

§ 439. Congress, also, so the article before us proceeds to state, may establish "uniform laws on the subject of bankruptcies throughout the United States." The exercise of this power is discretionary in congress; and to the action of congress in this respect the state authorities must yield.[5] Nor is it necessary that persons to be affected by bankrupt statutes should be exclusively merchants or traders.[6] The local assets, under a bankrupt assignment, pass to the assignee, though the better opinion is that such assignments do not operate extra-territorially. Hence, a Federal bankrupt discharge is effective throughout

[1] Taney, C. J., Dred Scott Case, 19 How. 393.

[2] See 15 Alb. L. J., 485. According to a statement made in the senate by Mr. Wallace, of Pennsylvania, in 1879, while a residence of five years is essential to enable a foreigner to be naturalized, and thus to become a citizen of the United States, "he may be a voter for members of congress, or for electors for President, or for the members of a state legislature who elect a United States senator, after he has resided six months in the country, if he lives in Kansas, Nebraska, Colorado, or Georgia, or within twelve months' residence in Alabama, Arkansas, Florida, Indiana, Minnesota, Missouri, Oregon, Texas, and Wisconsin."

[3] Com. *v.* Clary, 8 Mass. 72; Sinks *v.* Reese, 19 Oh. St. 306.

[4] Lanz *v.* Randall, 4 Dill. 425.

[5] Sturges *v.* Crowninshield, 4 Wheat. 122; Baldwin *v.* Hale, 1 Wall. 223.

[6] California Pac. R. R., *in re*, 3 Sawy. 270.

the United States; but a state insolvent discharge is only operative as between citizens of the discharging state, and between such citizens and validating creditors. Hence, also, a debt payable in a state to a person not domiciled in such state is not bound by a bankrupt discharge in such state.[1]

Jurisdiction extends to all cases of insolvency.

§ 440. The terms of the clause before us, it should be observed, are studiously general. It is not "congress shall have power to pass a bankrupt law;" which would imply that the power is to pass a law somewhat like the bankrupt law of England. But it is: "Congress shall have power to establish uniform laws on the subject of *bankruptcies* in the United States." This gives congress power to legislate on the subject of bankruptcies in the popular rather than in the technical sense, bankruptcies being regarded as equivalent to insolvencies. And this is checked neither by the limitation as to *ex post facto* laws, which relate solely to criminal prosecutions,[2] nor by that forbidding the impairing of contracts, which applies only to the states.[3] It is true that when there is no Federal law on the topic of bankruptcies in force, insolvent laws may be enacted by the states.[4] But the difference between a state bankrupt law and a Federal bankrupt law is, as already stated, this, that the former only discharges debts as between citizens of the discharging state, or when such discharge of such debts is validated by the creditor, while the discharge under a Federal bankrupt law is absolute throughout the United States. And it is settled that a discharge in insolvency by a state

[1] Whart. Conf. of Laws, § 1; *supra*, § 334.

The bankrupt law of 1867 did not become unconstitutional because it adopted the state laws regulating exemptions and thereby was unequal in operation, though uniform in principle. Beckerford, *in re*, 1 Dill. 45. It was held in Darling *v.* Berry, 13 Fed. Rep. 659, that a bankrupt law, which, by its terms, is made applicable alike to all the states, without distinction or discrimination, is not unconstitutional merely because its *operations* may be wholly different in one state from another. See, to the same effect, Jordan, *in re*, 8 Nat. B. R. 180; Everitt, *in re*, 9 Nat. B. R. 427; Smith, *in re*, 2 Woods, 458; *contra*, Waite, C. J., Eckert, *in re*, 10 Nat. B. R. 5. *Cf.* Smith, *in re*, 8 Nat. B. R. 401.

[2] *Infra*, § 472.

[3] Klein, *in re*, 1 How. 277; Sackett *v.* Andross, 5 Hill, 327; Thompson *v.* Alger, 12 Metc. (Mass.) 428.

[4] Sturges *v.* Crowninshield, 4 Wheat. 122.

insolvent court of a debt due by one of the citizens of such state is no bar to an action brought in such state by a citizen of another state, when such citizen was not a party to the insolvency proceedings.[1]

VIII. Money and Bills of Credit.

Congress may coin money and regulate its value.

§ 442. By the fifth clause of the eighth section of the first article of the constitution congress has power "to coin money and regulate the value thereof and of foreign coin." In the first clause of the tenth section of the same article it is further provided that no state shall "coin money," nor "make anything but gold and silver a tender in payment of debts." It became necessary, in view of the variation in values of coin uttered under the confederation, to bestow the exclusive power of coining on the general government. "Coining," in the sense in which the term is used, is the shaping and stamping of metal to serve as money; and this power is exclusive in congress. It is also clear that the states cannot make anything but gold and silver a legal tender; though whether they can make anything but United States coin a legal tender is still an open question. The question whether congress can make treasury notes a legal tender has been much discussed. When it was brought before the supreme court of the United States after the close of the war, a statute making such notes a legal tender, as to debts contracted both before and after the passage of the statute, was held unconstitutional by a majority of one of the judges.[2] Subsequently, on the accession to the court of two new judges, this decision was reversed, and the constitutionality of the statute was affirmed by a majority of one.[3] The question has ceased to have a practical interest since all treasury notes have become redeemable in gold. But in view of the fact that the power to establish a currency is limited

[1] *Infra*, § 495; Cook *v.* Moffatt, 5 How. 295; Baldwin *v.* Hale, 1 Wall. 223; Felch *v.* Bugbee, 48 Me. 9; Hills *v.* Carlton, 74 Me. 156; Scribner *v.* Fisher, 2 Gray, 43; Kelley *v.* Drury, 9 Allen, 27; Choteau *v.* Richardson, 12 Allen, 365, and cases cited *infra*, § 495. As to effect of removal into another state, see *infra*, § 495.

[2] Hepburn *v.* Griswold, 8 Wall. 603.

[3] Legal Tender Cases, 12 Wall. 457.

by the constitution to the coining of money, and of the fact, also, that no statute can, from the nature of things, make irredeemable paper a permanent currency,[1] the better view is that the power of congress to make such paper a legal tender can only be sustained as a temporary war measure. So far as concerns the states, it may be added that they may constitutionally designate the currency in which they will receive debts due to themselves for taxes.[2] It is admissible for a creditor, also, to stipulate in a contract in what currency the debt due him is to be paid.[3]

State cannot coin money nor emit bills of credit.

§ 443. Under the tenth section of the first article of the constitution, a state, as we have seen, cannot "coin money," nor "emit bills of credit." The limitation as to coining money has been already discussed. Bills of credit, in the sense in which the term is here used, are promissory notes, or bills issued by a state government exclusively on the credit of the state, and intended to circulate through the community for its ordinary purposes as money redeemable at a future date, and for the payment of which the faith of the state is pledged.[4] There is nothing, therefore, in the limitation to preclude the issue of the notes of state banks,[5] even though guaranteed by the state,[6] or though the state was the sole stockholder.[7] Nor are promises in writing of a state to pay on a future day a fixed price for services received, "bills of credit, under the constitution."[8]

Congress may punish counterfeiting.

§ 444. Congress, also, has power to "provide for the punishment of counterfeiting the securities and current coin of the United States."[9] Under these general terms is included the power to punish the uttering and publishing of forged securities and coin, and

[1] *Supra*, § 26.

[2] Lane County *v.* Oregon, 7 Wall. 71.

[3] Bronson *v.* Rodes, 7 Wall. 229; see Butler *v.* Horwitz, 7 Wall. 258. That a statute making paper money a legal tender must ultimately become inoperative, see *supra*, § 26.

[4] 1 Kent's Com., 408, citing Craig *v.* Missouri, 4 Pet. 410.

[5] State *v.* Billis, 2 McCord, 12.

[6] Darrington *v.* Bank, 13 How. 12.

[7] Briscot *v.* Bank, 11 Pet. 257; and see McCoy *v.* Washington Co., 3 Wall. Jr. 381; Bailey *v.* Milner, 1 Abb. U. S. 261, 35 Ga. 330.

[8] Craig *v.* Missouri, 4 Pet. 410. As to currency and legal tenders, see *supra*, § 442.

[9] Const., art. I., § 8, cl. 6.

having them in possession for the purpose of uttering. How far this jurisdiction is exclusive is elsewhere considered.[1]

IX. Postal Service.

Congress has power to make arrangements for postal service.

§ 446. Nowhere is the doctrine of the evolution and modification of political power by environment more strikingly illustrated than in the clause which we have now to consider next in order. Congress has power, so it is said, "to establish post-offices and post-roads." These words, when they were written, described a few modest offices in the principal towns along the sea-coast in which, at the utmost, half a dozen clerks distributed mails which arrived bi-weekly by post-boys on horseback or in the pouches of wagons. Now the word "offices," which formerly described, in most instances, one or two rooms in a building used in the main for other purposes, is applied to stately palaces in which are employed multitudes of clerks who receive, sort, and distribute letters which, in several of our cities, are nearly six thousand times greater in bulk than the entire mail of the country at the time when the constitution was adopted.[2] "Post-roads" have undergone a still greater variation and extension of application. Not long before the days when the constitution was adopted, the mail between New York and Boston was carried by Dr. Franklin or his immediate deputies, at uncertain intervals, over the circuitous country roads which skirted the northern shore of Long Island Sound, and then taking the western shore of Narragansett Bay, struck upwards through Providence to Massachusetts. For a while, under the constitution, "post-roads" designated these and similar lines of travel, sometimes fit for wagons, sometimes only passable by post-boys on

[1] *Infra*, § 524; *supra*, § 381.

[2] In 1790 there were seventy-five post-offices in the United States, and mails were carried only twice a week between New York and Boston in winter, and three times a week in summer. In 1882 there were 46,231 post-offices, with mails between the great cities three times a day. In 1790 the extent of the post-routes was 1875 miles; in 1882, 343,618 miles. In 1790, letters from New York to Philadelphia cost 25 cents; in 1883, from New York to San Francisco two cents, and postal cards one cent. In 1790, the revenue of the post-office was $37,935; in 1882, $41,876,410; see *supra*, § 555.

horseback. But even this "road" did not exclusively relate to land travel, since between New York and Providence, and between Philadelphia and the southern ports, the mail was frequently taken in coasting vessels. Shortly afterwards, steamboats were introduced, and as soon as their superior expedition and punctuality as modes of travel were ascertained, the tracks they took were regarded as "roads;" and in the same category were subsequently placed the canals which, between Albany and Buffalo, and Philadelphia and Pittsburgh, formed for a time part of the line of ordinary conveyance of passengers and goods. In our own day, the mail is almost exclusively carried on railroads; though in almost all great thoroughfares, *e. g.*, between Philadelphia and New York, where the Hudson River has to be passed, these are helped and supplemented by steam ferry-boats. No one has ever doubted that the tracks traversed by these various vehicles of transportation are "post-roads" in the sense of the clause before us. "Post-road," therefore, may be defined as the medium by which information is transmitted from point to point. If the track of water over which a ferry-boat passes is a post-road, so we may hold to be the wire over which pass the messages of the telegraph or telephone. In other words, "post-road" is to be read in the sense of "agency for the transmission of information."[1]

Question whether congress can create "post-roads" is political not judicial.

§ 447. The meaning of the word "establish," however, in this connection, has been the object of animated controversy. On the one side it has been argued that congress, under this term, has power only to use established routes and conveyances for the transmission of the mail. On the other side it has been insisted that it is the right and duty of congress to

[1] As to constitutionality of laws restricting the transmission of mail matter, see *infra*, § 555.

The Federal statute of July 24, 1866, authorizing telegraph companies to maintain and operate lines of telegraph "over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of congress," is constitutional; and prohibits the directors of any railroad declared to be a post-road from preventing any particular telegraph companies from putting up a line of poles on its road-bed; Pensacola Tel. Co. *v.* West. Union Co., 96 U. S. 1; West. Union Tel. Co. *v.* Am. Union Co., 19 Am. Law Reg. 173; West. Union Tel. Co. *v.* R. R., 11 Fed. Rep. 1.

build and control throughout the whole land avenues of commerce, over which not only mails, but travellers and goods can be carried. The issue thus presented has never been brought to the supreme court for determination, as there is hardly any possible way in which the question could be the object of *bona fide* litigation. The prevalent practice, however, has been for the government to lease for the mail such modes of conveyance as private or state enterprise has already opened for travel, and only to establish on its own account modes of conveyance when no other method of mail transport can be found. By Mr. Clay, however, and other American statesmen, it is claimed that under this clause new roads can be opened for the transmission, not merely of mails, but of passengers and goods, and for the general "internal improvement" of the United States. Bills for the erection of "national roads" for these purposes passed congress, but were on two conspicuous occasions arrested by vetoes based on the ground of their unconstitutionality. It was well for the country that such was the result, and that the progress of "internal improvement" of this class was for the time stopped: (1) because much of the money spent on turnpikes and canals would have been lost; (2) because the creation and arrangement of such "improvements" would have placed on the government a load of patronage under which it would have tottered. Yet it is hard to see, notwithstanding the force of argument by which these vetoes were sustained, why, if "to establish a post-office" involves a power to build a post-office, a power "to establish post-roads" should not involve a power to build post-roads. And in any view, the question whether "establishing a post-road" is necessary for the transportation of the mail is political rather than judicial.[1] And it is clear that the United States government, in undertaking to use lines of travel owned by private persons or states, does so as would any other customer, and is obliged to pay proper rates.[2]

"Post-office is any receptacle"

§ 448. Whatever is used as a receptacle for mail matter is a "post-office" under the clause before us.

[1] See discussion in 1 Kent's Com., 268–9.

[2] See Dickey *v.* Turnpike Co., 7 Dana, 113.

The term, therefore, covers a box or trunk carried from one building to another.[1] for mail matter.

X. Copyrights and Patents.

§ 450. By the eighth clause of the eighth section of article first congress has the power "to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." At common law an author or inventor has been held to have no such protection; his only right being under the act of congress and in conformity with its prescriptions.[2] The function of congress to legislate on the subject, however, is absolute and exclusive, though the states have no doubt power to offer bounties to particular industries.[3] It has consequently been held that state statutes, restricting the rights of patentees to sell their patented property, are unconstitutional.[4] But this does not preclude state police supervision of the patented article.[5] Copyrights and patents have no extra-territorial

Power of granting copyrights and patents belongs exclusively to congress.

[1] U. S. v. Marselis, 2 Blatch. 108.

[2] Wheaton v. Peters, 8 Pet. 591.

[3] Blanchard v. Sprague, 2 Story, 164; Blanchard v. Warner, 1 Blatch. 258.

[4] Hascall v. Whitmore, 19 Me. 102; Hollida v. Hunt, 70 Ill. 109; Helm v. Bank, 43 Ind. 167; Cranson v. Smith, 37 Mich. 309.

[5] In Wilch v. Phelps, Neb. Sup. Ct. 1883, we have the following: "As to the manufacture and sale of patented articles, state regulation has frequently been upheld as a proper exercise of police power. Thus, in Livingston v. Van Ingen, 9 Johns 582, Chancellor Kent said: 'The power granted to congress goes no further than to secure to the author or inventor a right of property, which, like every other species of property, must be used and enjoyed within each state according to the laws of such state. . . . If the author's book or print contains matter injurious to public morals or peace, or if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains with the state to restrain the use of the patent-right.' And in Patterson v. Com., 11 Bush, 311; 21 Am. Rep. 220, Pryor, J., in speaking upon this subject, used this language: "There is a manifest distinction between the right of property in the patent which carries with it the power on the part of the patentee to assign it and the right to sell the property resulting from the invention or patent. A state has no power to say, through its legislature, that the patentee shall not sell his patent, or that its use should be common to all of its citizens, for this would be in direct conflict with the law of congress. . . . The discovery or invention is made property by reason of the patent, and this right of property the

effect, being purely local in their operation.[1]—Congress, under this clause, has no power to grant an exclusive right to trade-marks.[2]

patentee can dispose of under the law of congress, and no state legislature can deprive him of this right; but where the fruit of the invention or the article made, by reason of the application of the principle discovered, is attempted to be sold or used within the jurisdiction of the state, it is subject to its laws like other property; and such has been the uniform decision of all the courts, state and Federal, upon this question."

In Bronahan, *in re*, 18 Fed. Rep. 62, it was ruled, that "the statute of Missouri, providing for the punishment by fine and imprisonment of any person who shall manufacture 'out of any oleaginous substance, or any compounds of the same, other than that produced from unadulterated milk, or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream of the same,' or who shall sell or offer for sale the same as an article of food, is not in violation of any provision of the constitution of the United States."

"It is quite clear," said Miller, J., the question coming up on a *habeas corpus* prayed for by a party convicted under the above-mentioned statute, "that if the Missouri statute is justly obnoxious to either of the four objections first named, it is void, and the person held for violating that statute is in custody in violation of the constitution of the United States, and the power and duty of this court to discharge him are unquestionable.

"We proceed to inquire if the law is so objectionable.

"1. As to the effect of the patent. The patent is introduced in evidence, and proof is offered to show that the article sold by the prisoner, and for which sale he is prosecuted, is the article specified in Mege's patent, and that the prisoner has such authority as the patent confers to sell it. The validity of the patent is not disputed. Has the prisoner, then, a right to sell the article thus patented, notwithstanding the statute of Missouri which forbids such sale? The constitution (art. I., § 8, cl. 8) gives congress power 'to promote the progress of science and useful arts by securing, for a limited time, to authors and inventors, the *exclusive right* to their respective writings and discoveries;' and the act of congress which is designed to give effect to this clause declares that in every case where a patent is issued under it, the patentee shall have the *exclusive right to make, use, and sell* the subject-matter of his patent, whatever it may be.

"It is to be observed that no constitional or statutory provision of the United States was, or ever has been, necessary to the right of any person to make an invention, discovery, or machine, or to use it when made, or to sell it to some one else. Such right has always existed, and would exist now if all patent laws were repealed. It is a right which may be called a natural right, and which, so far as it may be regulated by law, belongs to

[1] Whart. Conf. Laws, §§ 325–6.

[2] U. S. *v.* Steffens, 100 U. S. 82 (Trade-mark Cases).

XI. Piracies and Felonies.

§ 452. Congress has also power "to define and punish piracies and felonies on the high seas and offences against

ordinary municipal legislation, and it is unaffected by anything in the constitution or patent laws of the United States.

"The sole object and purpose of the laws which constitute the patent and copyright system is to give to the author and the inventor a monopoly of what he has written or discovered, that no one else shall make or use or sell his writings or his invention without his permission; and what is granted to him is the exclusive right; not the abstract right, but the right in him to the exclusion of everybody else.

"For illustration, an author who had written or printed a book always had the right to do so, and to make and sell as many copies as he pleased; and he can do this though he takes out no copyright for his work. But if he wishes to have the benefit of the exclusive right to do this, he can get it by securing a copyright under the act of congress. All that he obtains, then, by this copyright, all that he asks for or needs, and all it was designed to confer on him, is to make the right which he had already in common with everybody else, an exclusive right in him—a monopoly in which no one can share without his permission.

"But let us suppose that the book which he has thus copyrighted is an obscene and immoral book, which, by the law of the state in which it is published, may be seized and destroyed, and for that reason; does this statute, which forbids any one else but him to print or publish it, authorize him to do so? Can he violate the law because no one else can do it? Does the copyright confer on him a monopoly of vice, and an immunity from crime? Suppose a discovery of a cheap mode of producing intoxicating liquor, in regard to which the inventor obtains a patent for the product, does this authorize him to defy the entire system of state legislation for the suppression of the use of such drinks? The answer is, that the purposes of the patent law and of the constitutional provision are answered when the patentee is protected against competition in the use of his invention by others; and when the law prevents others from infringing on his exclusive right to make, use, or sell, its object is accomplished. This proposition is fully supported by the supreme court in the case of Patterson *v.* Kentucky, 97 U. S. 501. That case also cites with approval the following language from the opinion of the supreme court of Ohio in the case of Jordan *v.* Overseers of Dayton, 4 Ohio, 295:—

"'The sole operation of the statute [the patent law] is to enable him [the inventor] to prevent others from using the product of his labors, except with his consent. But his own right of using is not enlarged or affected. There remains in him, as in every other citizen, the power to manage his property or give direction to his laborers at his pleasure, subject only to the paramount claims of society, which require that his enjoyment may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare, if held subject to state control.'

"The principle is reaffirmed in Webber *v.* Virginia, 103 U. S. 344."

Congress has jurisdiction over piracies and felonies on high seas.

the law of nations." The legislation of congress on these topics is elsewhere discussed.[1] Piracy, as we have seen, is an offence by the law of nations, and by that law must be defined;[2] and it is now settled that privateering is not piracy.[3]—Felonies on the high seas are elsewhere distinctively discussed.[4]

XII. War.

War is the prosecution by a nation of a right by force; and may exist without a formal declaration.

§ 454. War, in an international and public sense, is a prosecution by a nation of a right by force.[5] It must be a prosecution; a mere passive attitude of belligerency is not war. It must be by a nation or body of men claiming to be a nation; war, in this sense, is not constituted by hostilities by a private person or group of private persons. It must be by force: mere diplomatic contests, no matter how violent, are not war. But it is not necessary to war that it should be formally declared;[6] and this holds in this country, though it is provided by the constitution of the United States that congress shall have power "to declare war, to grant letters of marque and reprisal, and make rules concerning captures by land and water.[7] Hence it is within the province of the president to use all the forces at his command to resist an attack by a foreign or insurrectionary power, without waiting for a congressional declaration of war.[8]—That a war between two countries suspends business intercourse between the inhabitants of such countries has been already seen.[9]

§ 455. The power "to make rules concerning captures on land and water" authorizes congress, not merely to make such

[1] Whart. Crim. Law, 8th ed., §§ 1860 *et seq.*; *supra*, §§ 181, 200.

[2] *Supra*, § 200.

[3] *Supra*, § 201.

[4] Whart. Crim. Law, 8th ed., §§ 269, 1860 *et seq.*

[5] *Supra*, §§ 209 *et seq.* See remarks by Grier, J., in the Prize Cases, 2 Black, 635, 666.

[6] *Supra*, § 211.

[7] Const., art. I., § 8, cl. 11.

[8] The Prize Cases, 2 Black, 635, 666; The Amy Warwick, 2 Black. 635.

[9] See *supra*, § 210. That the judiciary are bound by an executive declaration of war, see Britton v. Butler, 9 Blatch. C. 456; *supra*, §§ 388–9.

rules, but to take measures to enforce them. Under this power the private property of the hostile belligerent may be seized on land or at sea, and after seizure may be disposed of as congress directs. This right to capture extends to the property of belligerent insurgents as well as to that of belligerent foreign states.[1] Nor is the right to capture confined to movable property. The United States, under this power, may seize and retain an enemy's land either by forcible annexation or by annexation by process of treaty.[2] The power of making rules as to captures justifies, also, the establishment of provisional and military courts as tribunals for the government of the territory of a hostile belligerent occupied by force,[3] though such courts cease to have jurisdiction when peace is restored and the civil courts have resumed their ordinary duties.[4] But no seizure of private property, not contraband of war, of insurgents can be made except in subordination to act of congress. —Seizures of goods of a foreign enemy are also subject to the law of nations.[5]

Property of belligerent may be captured.

[1] The Prize Cases, 2 Black, 635; The Grape-Shot, 9 Wall. 129; Tyler *v.* Defrees, 11 Wall. 331.

As to limitations, see *supra*, §§ 215–218.

As to seizures at sea, see *supra*, §§ 218 *et seq.*

[2] Am. Ins. Co. *v.* Canter, 1 Pet. 511; see *supra*, §§ 216–218; *infra*, § 467.

[3] *Supra*, § 212; *infra*, § 467.

[4] Jecker *v.* Montgomery, 13 How. 498; Milligan, *ex parte*, 4 Wall. 2.

It is under the above clause that the seizure and liberation of persons held in slavery by a belligerent are sustained. Such action may also be defended on the ground on which rests the release of persons held captive by an enemy, and the appropriation of articles contraband of war found within his lines, see Weaver *v.* Lapsley, 42 Ala. 601; Hall *v.* Keese, 31 Tex. 504. To this President Lincoln's emancipation proclamation is to be restricted. *Infra*, § 584.

That the United States, as to insurgents, claimed to possess both sovereign and belligerent rights, see Rose *v.* Himely, 4 Cranch, 241, Marshall, C. J.; Alexander's Cotton, 2 Wall. 404; The Revere, 2 Sprague, 107; The Sarah Starr, Bl. Pr. Ca. 69; U. S. *v.* Hutes, 12 Am. Law Reg. 735; Miller *v.* U. S. 11 Wall. 268; Tyler *v.* Defrees, ibid. 331; see *supra*, § 217. On the other hand, after the civil war closed, the Federal government abandoned all attempts to prosecute for political offences those concerned in the insurrection (see *infra*, § 573); and the confiscations sustained by the supreme court of the United States were sustained, not as political, but as belligerent acts; see *infra*, § 467. As to union of sovereignty or belligerency see *infra*, § 593.

[5] *Supra*, §§ 216–9.

§ 456. Congress, so the constitution proceeds to say, has power to "raise and support armies; but no appropriation of money to that use shall be for a longer term than two years." The object of the last qualification is to place the sustenance of a standing army directly under the control of the people, preventing any one congress from making the army, by a long appropriation, independent of the action of the congress next succeeding. The power itself is unrestricted, except by this clause. Congress can direct the raising and support of a standing army, either permanent or temporary, of any size, and may take all necessary measures to obtain for such armies the services of men and ammunition. For this purpose a conscription may be directed and enforced,[1] and minors can be enlisted, even without the assent of their parents or guardians.[2] What has been said with regard to the army applies also to the navy, which congress, under the constitution, may "provide and maintain."[3]

Power to raise and support armies sustains raising of standing army and conscription.

§ 457. Congress, under the fifteenth clause of the same section, may "provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions." The militia consists of forces organized by the states, and is under state jurisdiction, so far as concerns its direction, until called into the service of the United States. When the power to call forth the militia is vested in the president, he may make the call either on the executives of the particular states, or on the militia officers directly. He is the exclusive judge of the question whether the call should be made, and

Militia may be called out by general government.

[1] Kneedler *v.* Lane, 45 Penn. St. 238; see discussion of this remarkable case in Pomeroy's Const. Law, § 477. This was held to be so under the constitution of the Confederate States, though that constitution was based on an avowedly narrower system of governmental powers than was the constitution of the United States; Barber *v.* Irwin, 34 Ga. 27; Tate, *ex parte*, 39 Ala. 264; Coupland, *ex parte*, 26 Tex. 386. As to the controversies on this point see *supra*, §§ 389, 390.

[2] Browne, *ex parte*, 5 Cranch C. C. 554; U. S. *v.* Bainbridge, 1 Mason, 71; but see Barrett, *in re*, 42 Barb. 479; Wh. Cr. Law, 8th ed., § 267.

[3] Const., art. I., § 8, cl. 13.

when the call is made, obedience is imperative.[1] Power is further given to congress to "provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."[2]

States subordinated in this respect to United States.

§ 458. It will be seen from the above provisions that the states, even in respect to the command of the militia, are subordinated to the United States, and that the command of the militia, when called out, as well as the authority to make the call, is vested under congress in the president. This supremacy of the United States is sustained by other provisions. No state, for instance, can, without the consent of congress, keep troops or ships of war in time of peace, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay.[3] The states, also, are prohibited from entering into any treaty, alliance, or confederation, or granting letters of marque and reprisal.[4]

Congress may make rules for regulation of army and navy, but cannot supersede civil courts.

§ 459. By the fourteenth clause of the same article, congress "may make rules for the government and regulation of the land and naval forces." Congress, however, cannot in this respect invade the prerogatives vested by the constitution in the president of the United States as commander-in-chief. The military law thus imposed regulates the army and navy,[5] as well as the territory which they may conquer, or dominate until the civil courts are restored;[6] while martial law is the law which determines offences by officers of army and navy, or by persons arrested as offending against the general laws of war.[7] Military law, in other words, is the law imposed for the government of the seat of war; martial law is the law adopted by belligerent forces for their own govern-

[1] Houston *v.* Moore, 5 Wheat. 1; Martin *v.* Mott, 12 Wheat. 19.

[2] Const., art. I., § 8, cl. 16.

[3] Const., art. I., § 10, cl. 3; see *supra*, §§ 389, 390.

[4] Const., art. I., § 10, cl. 1.

[5] Bogart, *in re*, 2 Sawy. 396; Martin *v.* Mott, 12 Wheat. 19.

[6] *Supra*, §§ 38, 212.

[7] *Supra*, § 37.

ment.[1] But congress, while it can establish a provisional military government in a conquered territory until civil government is established or restored, cannot constitutionally supersede civil courts by military in any part of the United States.[2] The members of a court martial, it should be added, are liable in civil suits for damages to parties whom they may illegally imprison, or otherwise materially prejudice.[3]

XIII. District of Columbia, Ceded Places, and Territories.

In district and ceded places, congress has exclusive jurisdiction.

§ 461. Congress, by the seventeenth clause of the eighth section of the first article, has power "to exercise exclusive legislation in all cases whatsoever, over such district, not exceeding ten miles square, as may by the cession of particular states and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Over the District of Columbia congress took control immediately on the cession of the site by the states of Maryland and Virginia, such control being subject only to the constitution of the United States.[4] The case is exceptional, like that of the territories.[5] The states, after such cession, cease to have jurisdiction over the territory ceded.[6] But mere occupation by the United States, without express cession, does not give jurisdiction.[7]

[1] See Wh. Cr. Pl. & Pr., § 979, note, and see, *supra*, §§ 37–8.

[2] Milligan, *ex parte*, 4 Wall. 2, 129; see *infra*, §§ 579, 593.

[3] Milligan *v.* Hovey, 3 Biss. 13. That military tribunals may take cognizance of offences on the field of war when there are no civil courts in operation, see Coleman *v.* Tennessee, 97 U. S. 509.

[4] U. S. *v.* Hall, 98 U. S. 343.

[5] Loughborough *v.* Blake, 5 Wheat. 317; Cohens *v.* Virginia, 6 Wheat. 264. The portion of the District of Columbia ceded by Virginia has been by act of congress given back to Virginia.

[6] U. S. *v.* Wiltberger, 5 Wheat. 76; U. S. *v.* Cornell, 2 Mason, 60; Com. *v.* Clary, 8 Mass. 72; U. S. *v.* Davis, 5 Mason, 356.

[7] U. S. *v.* Ames, 1 Wood. & Minot, 76; People *v.* Godfrey, 17 Johns. 225.

§ 462. By the third section of the fourth article of the constitution, it is provided that "New states may be admitted by the congress into this union; but no state shall be formed or created within the jurisdiction of any other state; nor any state formed by the junction of any two or more states or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress. The congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claim of the United States or of any particular state." The vagueness of this clause is an illustration of the position, elsewhere discussed at large, that the institutions of a people spring not from their legislators, but from themselves.[1] The territorial growth of the United States, so far from being expected by those who formally framed the constitution, was not even provided for by them as a contingency. Three-fourths of our country, as it now exists, was not included in the original confederacy of states; yet it is to that original confederacy alone that the constitution formally applies. Our territorial system in its present shape is the product of popular evolution, not of governmental dictation.[2] It was the discursive energy of the people overflowing into unoccupied fields, not legislation, that was the primary cause of the creation of one class of our western states; it was not war nor treaty, but the instinctive ascendency of the Anglo-Saxon race, coupled with the same pioneer impulse, that was the primary cause of the admission into the Union of Texas and of the states on the Pacific.[3] The framers of the constitution neither conceived nor provided for any such enlargement of domain. Viewing the constitution critically, the right to annex new territory can only be with difficulty inferred from the treaty-making and war powers given to the general government; and it was for this reason that not only did leading federalists deny the constitutionality of the pur-

Congress holds territories in trust.

[1] *Supra*, §§ 19, 360 *et seq.* That "territory" is not included under term "state," see *supra*, § 375.

[2] *Supra*, § 19.

[3] See *supra*, § 364.

chase of Louisiana, but Mr. Jefferson thought that an amendment to the constitution would be required to sanction this purchase. It is true that it is hard to conceive of a treaty for the purpose of settling territorial controversies between nations which may not involve the cession or acceptance of territory; yet, in a constitution which undertook to confer only specified powers on the general government, it would be supposed that, if it were intended to permit that government to annex vast domains equal to its prior possessions, the power would have been expressed. The annexations of Louisiana, of Florida, of Texas, of the Pacific coast were political necessities; yet so little was this foreseen by the framers of the constitution that it was only to a happy vagueness in the clause before us that it was possible for these annexations to take place without amendments by the attempts to pass which the country might have been convulsed. The same vagueness applies to the expressions more particularly relating to the territories then belonging to the United States. There are no specific limitations applied to these territories. It is only by inference from this and other clauses that we learn to regard them as incipient or embryo states, and to be held, while in the territorial condition, in trust for the whole United States.[1]

Title to the land of such territories in the United States.

§ 463. There are two aspects in which the territories are to be viewed: 1st. As to the title to the land inclosed within their boundaries; 2d. As to its political control. As to the first, it has never been questioned that congress has the right not only to dispose of the title to such land to settlers, but to grant it as bounties to soldiers, and as endowment to railroad corporations whose roads are to penetrate and enrich the territory.[2]

[1] See Dred Scott *v.* Sandford, 19 How. 393, discussed *infra*, § 464.

That congress has the right to acquire new territory by treaty was affirmed in Am. Ins. Co. *v.* Canter, 1 Pet. 511; Dred Scott *v.* Sandford, 19 How. 393. That the people of the territories are not of right entitled to self-government, see Am. Ins. Co. *v.* Canter, 1 Pet. 511; Territory *v.* Lee, 2 Montana, 124; Reynolds *v.* People, 1 Col. 179. As to treaties, see *supra*, § 383, *infra*, § 506.

[2] See U. S. *v.* Gratiot, 14 Pet. 526. That the United States government has supreme authority over Indian reservation, see *supra*, §§ 265, 434.

§ 464. Congress has power, as we have seen, to make "all needful rules and regulations" for the territories. We are not to infer from this that congress is absolute in this relation. The rules it makes for the government of the territories must be (1) needful; and (2) in accordance with the general system of safeguards which the constitution has established. The very fact that territories are infant states, to be admitted into the Union on maturity, shows that they are to be governed on the same general principles, as far as is applicable, as are states, just as infants *mutatis mutandis* are governed on the same general principles, so far as concerns safeguards, as are adults. In this sense we are to understand the remark of Marshall, C. J., that "in legislating for them (the territories) congress exercises the combined powers of the general and a state government."[1] Upon this position was in part rested the ruling in a celebrated case which, on the eve of the late civil war, contributed materially to precipitate the rupture.[2] In that case the following positions were laid down by the court: (1) The clause of the fourth article of the constitution, above quoted, applies exclusively to the territory surrendered by the states during the confederation, and consequently the ordinance of 1787, restricting slavery, applies only to such territory. (2) As to the other territory subsequently acquired by the United States, the legislation of congress must be in trust for the whole Union, and in subordination to the first eight amendments to the constitution, which forbid the deprivation of life, liberty, or property without due process of law, and establish in other respects restraints on governmental power. (3) As the constitution recognizes property in slaves, and as the territories are to be held in trust for the whole Union, no legislation of congress is constitutional which precludes the owners of slaves from carrying such property into the new territories.—The *first* of these conclusions was sustained by reasoning too highly artificial to be generally accepted, and may be regarded as no longer authoritative.

Government to be under general safeguards of constitution.

[1] Am. Ins. Co. *v.* Canter, 1 Pet. 542.. 393. See *supra*, § 389, as to history of

[2] Dred Scott *v.* Sandford, 19 How. this case.

The *third* is rendered nugatory by the thirteenth amendment to the constitution. The *second* establishes an important principle by which liberal institutions in the territories are permanently insured. As a general rule, however, the power of congress over the territories is limited only by the constitution, and in congress is as to the territories the residuum of sovereignty.[1]

Form of government at discretion of congress.

§ 465. By the ordinance of 1787, the governor and judges appointed for the northwest territory, or a majority of them, were authorized to adopt for the territory such laws of the states then in the confederation as might be best for the territory, reporting these laws to congress from time to time, congress having the right to disapprove of them. As soon as there should be a population of five thousand free male inhabitants of full age in the territory, they were to be empowered to elect a territorial legislature. This legislature was to have ordinary legislative power subject to the supervision of congress.[2] After the adoption of the Federal constitution, statutes directing the formation of territorial governments have, in most cases, authorized the election of territorial legislatures, reserving the appointment of governor and judges to the president and senate. In some cases the governor and judges have been invested with provisional legislative powers. But in all cases congress reserves a supervisory legislative authority.[3]

[1] National Bank *v.* Yankton, 101 U. S. 129; Reynolds *v.* U. S., 98 U. S. 145. In National Bank *v.* Yankton, 101 U. S. 133, Waite, C. J., said: "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of congress. The territories are but political subdivisions of the outlying dominion of the United States. Their relations to the general government are much the same as that which counties bear to the respective states, and congress may legislate for them, as a state does for its municipal organizations. The organic law of a territory takes the place of a constitution as the fundamental law of the local government."

[2] Miner's Bank *v.* Iowa, 12 How. 1; Vincennes *v.* Indiana, 14 How. 268.

[3] See Reynolds *v.* U. S., 98 U. S. 145.

XIV. Treason.

§ 467. Treason, as a criminal offence, is elsewhere discussed at large.[1] Congress, it is provided, is empowered "to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted." By this provision there can be no forfeiture nor confiscation of property after conviction of treason, beyond the life of the person convicted.[2] Confiscation, as a procedure of the civil government, can only be by act of congress and in subordination to the limitations of the constitution. As a war measure it can be exercised, as we have seen,[3] as to the property of such insurgents as have been recognized as belligerents.[4] But a loyal citizen, temporarily residing among such insurgents, is entitled to have granted to him a reasonable time to close up his business engagements and give up such residence.[5]

Treason works no forfeiture except for life.

XV. Incidental Powers.

§ 468. After enumerating the powers above specified, this section of the constitution concludes with empowering congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or office thereof."[6] It has been argued that the effect of this clause is to strip the preceding enumerations of all their restrictive features, and to make the government of the United States practically absolute.

Congress may make laws to carry into effect enumerated powers.

[1] Whart. Crim. Law, 8th ed., §§ 1782 *et seq.*; see *infra*, § 471. As to confiscation of belligerent property, see *supra*, §§ 217, 455.

[2] See Bigelow *v.* Forrest, 9 Wall. 339; U. S. *v.* Greathouse, 2 Abb. U. S. 364; Wallach *v.* Van Riswick, 92 U. S. 202; Pike *v.* Wassell, 94 U. S. 711; French *v.* Wade, 102 U. S. 132; see as to confiscation as a war measure, *supra*, § 217.

[3] *Supra*, §§ 217, 455.

[4] Alexander's Cotton, 2 Wall. 404; Flying Scud, 6 Wall. 263; Miller *v.* U. S., 11 Wall. 268; U. S. *v.* Padelford, 9 Wall. 531.

[5] The William Bagaley, 5 Wall. 377; The Gray Jacket, 5 Wall. 342, 370.

[6] Const., art. I., § 8, cl. 18.

But this is not the case. The clause before us simply recapitulates the common law rule that the grant of a power carries with it the right to use all the means necessary to carry such power into effect.[1] Without the clause before us, the government of the United States would have been authorized to have done whatever was necessary and proper to carry into effect any one of the powers specifically given to it by the constitution. The power, for instance, to establish post-offices, would have enabled it to do whatever is usual and proper to make such post-offices effective; the power to regulate commerce includes the power to pass whatever laws are necessary to make such regulation effective. Without this clause, however, there might have been ground, before the adoption of the amendment reciting that rights not granted are reserved to the states or the people, to argue that the enumerated powers were merely samples of a general mass of jurisdiction thrown on the government of the United States. The clause before us effectually excludes this hypothesis. The power of general legislation given to congress is limited to the "carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof." This provision, taken in connection with the amendment as to reserved powers above noticed, draws a fixed line of demarcation between the sovereignty of the United States and that of the particular states. No legislation by congress that is not necessary or proper to carry out an enumerated power is constitutional.[2]

[1] Hence, a statute prescribing penalties for offences against Federal elections is constitutional; Siebold, *ex parte*, 100 U. S. 371; Clarke, *ex parte*, 100 U. S. 399; U. S. *v.* Gale, 109 U. S. 65; *supra*, § 396.

As congress has authority under section 4, article 1, of the constitution to regulate Federal elections, section 5506 of the revised statutes, passed in pursuance of such authority, and for that purpose, is constitutional and valid as to such elections, but has no application to state or municipal elections; United States *v.* Reese, 92 U. S. 214, distinguished. U. S. Cir. Ct., E. D. Virginia, April 12, 1883; U. S. *v.* Munford. As to "reconstruction" measures, see *infra*, §§ 584–593.

[2] See Kilbourn *v.* Thompson, 103 U. S. 168.

XVI. Bills of Attainder.

§ 471. We have next to consider the limitations imposed by the constitution on legislation, beginning with those which apply to congress as well as to state legislatures. The first restriction of this class to be mentioned is that which prohibits bills of attainder. "Bill of attainder" is a procedure with which the framers of the constitution had cause to be familiar. Both parties, in the revolutionary struggle, had used bills of attainder to inflict sometimes gross injustice on their antagonists; and by this process had been brought to the block in England, not merely some of the most dangerous opponents of free institutions, but some of their most illustrious defenders. A bill of attainder is an act by which the legislature, unshackled, as it assumes in such cases to be by strict rules of law, declares an accused party to be guilty of an offence with which he is charged, and assigns to him what is deemed a suitable punishment. This method of procedure is prohibited by the constitution, and provisions are afterwards introduced granting all necessary safeguards in cases of prosecution for crime, and requiring that these prosecutions shall take place before an impartial jury. In England bills of attainder have been generally employed to inflict capital punishment upon individuals whose life parliament considers to be a public danger. In this country the term has a wider signification; and the supreme court of the United States has held that statutes prescribing that clergymen and lawyers shall not exercise their profession until they take oath that they have not been concerned in rebellion, are unconstitutional, as being virtually bills of attainder.[1]

Bills of attainder prohibited.

[1] Cummings *v.* Missouri, 4 Wall. 277; Garland, *ex parte*, 4 Wall. 333; Pierce *v.* Carskadon, 16 Wall. 234.

As to confiscation, see *supra*, §§ 217, 455, 467.

As to the reckless way in which bills of attainder were passed by the colonies during the American Revolution, see Story, Com. Const., § 1338; Sedgw. Stat. Law, 557; Jackson *v.* Catlin, 2 Johns. R. 248. See case of attainder and execution stated in 3 Elliott's Debates, 66.

XVII. Ex Post Facto Laws.

§ 472. Both congress and state legislatures are prohibited from passing *ex post facto* laws.[1] Were this prohibition to be construed generally, it would be a serious clog to legislation; but it has been declared by the supreme court to be confined to criminal prosecution. Viewed in this sense, an *ex post facto* statute is a statute which makes an act punishable which was not punishable before the passage of the statute, or which increases the punishment of an act beyond what it was subject to at the time of its commission,[2] or which takes from the defendant a material safeguard which he could have availed himself of if he had been tried immediately after the commission of such offence.[3] It may often, however, be a matter of dispute whether a penalty attached by a new law is severer than the penalty in force under the old law when the offence was committed. In such cases the question, if the case be in equilibrium, is to be determined in favor of the accused.[4] When, on the other hand, a severe penalty has been abolished by the legislature, this penalty cannot be inflicted on a party convicted of an offence committed before the abolition of the penalty.[5] A distinction,

Limitation as to *ex post facto* laws relates to criminal prosecutions.

[1] Const., art. I., § 9, cl. 3; art. I., § 10, cl. 1. See Wade on Retroactive Laws, §§ 8, 270.

[2] See for a wider view, U. S. *v.* Hughes, 8 Ben. 29.

[3] U. S. *v.* Jones, 3 Wash. C. C. 209; Calder *v.* Bull, 2 Dall. 386; State *v.* Corson, 59 Me. 137; Ratzky *v.* People, 29 N. Y. 124; Com. *v.* King, 1 Whart. 207; State *v.* Keith, 63 N. C. 140; and cases cited Whart. Crim. Law, 8th ed., § 29.

[4] Whart. Crim. Law, 8th ed., § 30, and cases there cited.

[5] Ibid., citing Hartung *v.* People, 22 N. Y. 95; Com. *v.* Wyman, 12 Cush. 237; see, also, Lord *v.* Chadbourne, 42 Me. 429; Coffin *v.* Rich, 45 Me. 507. In Cummings *v.* Missouri, 4 Wall. 277, where a state test act excluding clergymen from the right to exercise their profession on the ground of participancy in the rebellion, and in Garland, *ex parte*, 4 Wall. 333, where the statute was that no lawyer could be admitted to practise in the Federal courts who had taken part in the rebellion, the unconstitutionality of the statutes was based by the majority of the court not only on the clause forbidding bills of attainder, but on the clause forbidding *ex post facto* legislation. See as to test acts, Anderson *v.* Baker, 23 Md. 531; Blair *v.* Ridgeley, 41 Mo. 63; Murphy and Glover Test Cases, 41 Mo. 339; State *v.* Williams, 5 Wis. 308; Davies

however, has been taken between cases in which there is a mere reduction of punishment of a particular kind, in which

v. McKeelby, 5 Nev. 369; Rison v. Farr, 24 Ark. 161.

In Kring v. Missouri, 107 U. S. 221, 4 Cr. Law Mag. 550, the plaintiff in error was convicted of murder in the first degree by the judgment of the supreme court of the state of Missouri. He had been previously sentenced to twenty-five years' imprisonment on his plea of guilty of murder in the second degree, which sentence was, on his appeal, reversed and set aside. By the law of Missouri, in force when the homicide was committed, this conviction was an acquittal of the higher crime of murder in the first degree, but that law was changed before the plea of guilty, so that a judgment on that plea, set aside lawfully, should not be held to be an acquittal of the higher crime. It was held, by the supreme court of the United States, that as to this case the new law was *ex post facto*, and that the plaintiff in error could not be again tried for murder in the first degree. Waite, C. J., Bradley, Gray, and Matthews, JJ., diss.

"It will be observed," said Miller, J., giving the opinion of the court, "that here are grouped contiguously a prohibition against three distinct classes of retrospective laws, namely, bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. As the clause was first adopted, the words concerning contracts were not in it, because it was supposed that the phrase "*ex post facto* law" included laws concerning contracts as well as others. But it was ascertained before the completion of the instrument that this was a phrase which, in English jurisprudence, had acquired a signification limited to the criminal law, and the words "or any law impairing the obligation of contracts" were added to give security to rights resting in contracts. 2 Bancroft's History of the Constitution, 213.

"We are of opinion that any law passed after the commission of an offence, which, in the language of Washington, in United States v. Hall, 'in relation to that offence or its consequences, alters the situation of a party to his disadvantage,' is an *ex post facto* law, and in the language of Denio, in Hartung v. People, 'no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time.'

"Tested by these *criteria*, the provision of the constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree, on conviction of murder in the second degree, is, as to his case, an *ex post facto* law within the meaning of the constitution of the United States, and for the error of the supreme court of Missouri in holding otherwise, its judgment is reversed and the case is remanded to it, with direction to reverse the judgment of the criminal court of St. Louis, and for such further proceedings as are not inconsistent with this opinion."

In Garvey v. People, S. Ct. Col., 1883, it was held that a law enacted after the commission of an offence which alters the effect given to a plea of guilty to the disadvantage of one accused of such offence is, so far as he is concerned, *ex post facto* and void. See

it is held that the reduced penalty may be imposed, and cases in which one kind of punishment has been taken away, and an entirely distinct kind of punishment imposed. In the latter case it has been held that there can be no punishment at all inflicted on offences committed before the passage of the second act. The old punishment cannot be inflicted because the statute is repealed. The new punishment cannot be inflicted because the statute is *ex post facto*.[1] But this distinction should not be applied in cases where it is not plain that the object was to repeal the first statute as to cases to which it would otherwise constitutionally apply.[2]

Shepherd *v.* People, 25 N. Y. 406; Petty, *in re*, 22 Kas. 477.

A mere change in classification of crimes is not *ex post facto* legislation; Com. *v.* Gardner, 11 Gray, 438. Nor is substitution of imprisonment and whipping for death; State *v.* Williams, 2 Rich. L. 418; and so of imprisonment for pillory and fine. Clarke *v.* State, 23 Miss. 261. But an increase of fine is unquestionably nugatory when *ex post facto*. Wilson *v.* R. R., 64 Ill. 542.

That in questions of this class the benefit of the doubt will be given to the prisoner, whose situation and condition are to be taken into consideration in determining whether the change is an aggravation, see Hartung *v.* People, 22 N. Y. 95; Ratzky *v.* People, 29 N. Y. 124, and discussion in Wade on Retroactive Laws, § 276.

That a second offence committed subsequent to the passage of the statute (the first offence being prior to the act), is governed by the statute, see Riley's Case, 2 Pick. 172; Rand *v.* Com., 9 Grat. 738.

An act of congress relieving parties from prosecution for acts done under military authority during the late civil war is not unconstitutional. Drehman *v.* Stifle, 8 Wall. 595.

[1] Shepherd *v.* People, 25 N. Y. 406; State *v.* McDonald, 20 Minn. 136.

[2] In Moore *v.* State, 42 N. J. L. 20 (above cited), it was held that a statute reviving the state's right to prosecute for an offence committed previously, after prosecution has been barred by the statute of limitations, is unconstitutional and void. The following is part of the opinion of the majority of the court, as given by Dixon, J.:—

"We now come to a second position taken by the plaintiff in error, that the statute of 1879, so far as it purports to reach his case, is an *ex post facto* law. If it be, it is expressly prohibited by both state and Federal constitutions. It has already been seen that at the time this act was passed, the plaintiff was, under pre-existing laws, relieved from all liability to punishment for his offence, and if there be now any such legal liability, it is because that liability has been created by the statute in review. The question, therefore, is, whether a law which creates a liability to punishment for a preceding offence in an *ex post facto* law. *Ex post facto* laws are, in a general sense, enactments after the facts to which they relate, and the expression would include both criminal and civil statutes. Burrill's Law Dict. *sub nom.* In Den *v.* Goldtrap, Coxe (N. J.), 272, A. D. 1790, Chief Justice

§ 473. It is within the constitutional domain of the legislature, either Federal or state, to modify even criminal proce-

Kinsey, in the supreme court, said of a law for the recording of pre-existing mortgages, 'This act, strictly speaking, is *ex post facto*.' Not long afterwards, the same court adjudged a statute, declaring that in certain cases payments made in continental money should be credited as specie (Pat. Laws, p. 172), to be *ex post facto* law, and as such, unconstitutional. 4 Hals. (N. J.) (appendix) 444. And in State *v.* Parkhurst, decided in 1802, and reported in the same appendix, Chief Justice Kirkpatrick said that a law, depriving a man of one office because of his holding some other office, might, perhaps, be questioned as an *ex post facto* law. See, also, Justice Johnson's references in appendix, at 2 Pet. (U. S.) 681. But it has now long been settled that, as used in our constitutions, the phrase embraces only retrospective statutes of a criminal or penal character. To what extent it includes these is not so definitely determined. It has sometimes been said that, at the time of the adoption of the Federal constitution, the words had acquired a fixed meaning as a technical term; but a reference to the citations already mentioned shows, that this statement is not exactly true, and in Calder *v.* Bull, 3 Dall. 395, Judge Chase says, 'the words *ex post facto* law have not any certain meaning attached to them.' Blackstone's definition, so called, is the only one, before the constitution referred to, as giving the words precision. I think it is doing the illustrious commentator injustice to consider the language as an attempt to define the term. He was speaking of the necessity of having rules prescribed, made known, before they became obligatory, and after mentioning one iniquitous practice in this regard, he said: 'There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when, after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment on the person who has committed it.' To me, this appears rather an illustration than a definition. Doubtless, the class he specified was *ex post facto*, and, perhaps, the most glaring instance of the injustice of such laws, which was the thought he was aiming to present; but it hardly seems probable that he considered his illustration as embracing all possible cases. However this is, it cannot be disputed that the accuracy of this so-called definition was early denied, and it has never been received as complete; for a law, increasing the punishment of former crimes, is as clearly *ex post facto*, as one inflicting punishment for a previous innocent act. In *Exp.* Garland, 4 Wall. (U. S.) 333, Mr. Reverdy Johnson, *arguendo*, p. 365, quotes two other definitions by English writers, viz., that such a law is one 'made to meet a particular offense committed,' and that it is 'a law enacted purposely to take cognizance of an offence already committed.' These definitions differ from Blackstone's in the only particular wherein the latter fails to cover the case in hand. They do not regard as essential the innocence of the act for which the penalty is imposed.

"Turning now to authorities since the constitution was framed, we first notice the Federalist: but all the light which it affords is in the eighty-fourth number by Mr. Hamilton, where, however, he merely repeats the illustra-

Law merely changing procedure

dure as to prior offences in cases in which the d[redacted]e-fendant's rights are not substantially impaire[redacted].[1]

tion of Justice Blackstone. This, therefore, is not a perfect guide. Next comes the case of Calder *v.* Bull, 3 Dall. 386, one cited more frequently than any other. Of this case, it may be remarked that the only question before the court was, whether a law of Connecticut, granting a new hearing in a civil cause, was forbidden as being an *ex post facto* law; and when the court determined that the interdict did not extend to civil statutes, it decided the cause. What was said, therefore, by Judge Chase as to the kind of criminal statutes prohibited, was fairly *obiter dictum*. But in the course of his remarks, he mentions four classes of laws which he considers *ex post facto* within the words and intention of the constitution, and his classification has often been repeated by judges and text-writers in discussing the subject. Still it may not be presumptuous to say that doubts may be entertained whether his fourth class does not include cases outside of the prohibition; whether every law, that alters the legal rules of evidence and receives different testimony than the law required at the time of the commission of the offence, in order to convict the offender, is an *ex post facto* law. Mr. Bishop declines to assent to it, and Chief Justice Beasley mentions it with a 'perhaps;' and it is easy to see that it may entrench too far upon legislative control over mere methods of procedure. But it is plain that Judge Chase's classes extend much beyond Blackstone's expression. It seems to me, also, that Judge Chase did [redacted]ot consider his classes as exhaustive; [redacted]or he closes them with the remark, th[redacted]at 'all these and similar laws are ma[redacted]i-festly unjust and oppressive'—an all [redacted]-sion, doubtless, to the characteristi[redacted]s by which he had formulated his rule[redacted].

"The statute in hand is not cover[redacted]d by any of these classes, unless possib[redacted]y by the fourth; but as that is of que[redacted]-tionable propriety, it may be passe[redacted]d by. Looking, however, away from h[redacted]s classification to what he states to hav[redacted]e been the motive for and principle sus-taining the edict, we find him usin[redacted]g language which easily embraces the present case. Among the unrighteous acts of the British Parliament which moved the framers of our government to set up this restraint, he says, 'at other times they inflicted punishment where the party was not by law liable to any punishment;' which means, of course, not liable by any law in existence before the unjust law itself was passed. This phrase exactly describes the operation of our statute of 1879 upon the plaintiff. The law inflicted punishment upon him who was not, by pre-existing law, liable to any punishment. Again the judge says: 'The plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several states shall not pass laws after an act done by a subject or citizen, which shall have relation to such act, and shall punish him for having done it.' If this be true, then is the law forbidden; for it was passed after the act

[1] State *v.* Corson, 59 Me. 137; Com. *v.* Hall, 97 Mass. 570; Cassidy, *in re*, 13 R. I. 143; Koch's Estate, 5 Rawle, 338; State *v.* Manning, 14 Tex. 402. As to how far such laws impair the obligation of contracts, see *infra*, § 477.

Hence the mode of challenging may be intermediately modified, if thereby the defendant is not materially prejudiced.[1] The venue also may be interme-

not necessarily unconstitutional.

done by the plaintiff, and it had relation to such act and punished him for having done it. He further says: 'The prohibition is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation.' Then, behind this bulwark, the plaintiff's person must be protected from punishment by this legislative act having a retrospective operation. So in Calder *v.* Bull, the judges refer to the constitution of Delaware as prohibiting *ex post facto* laws, in these words: 'Retrospective laws, punishing offences committed before the existence of such laws, are oppressive and unjust, and ought not to be made.' Language could not more completely embrace this statute in its relation to the plaintiff. The words of the other state constitutions are not so plainly applicable: thus, those of Maryland and North Carolina declare 'that retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty. Therefore, no *ex post facto* law ought to be made.' One clause in this paragraph prevents the inclusion of the statute now before us in the class thus described; but it is noticeable, that the interdict is not limited to that class, but extends to all *ex post facto* laws, and it is conceded that such are those providing penalties for previous acts which were criminal under other laws.

"The next indication of the meaning of the phrase is Chief Justice Marshall's justly lauded expression in Fletcher *v.* Peck, 6 Cranch (U. S.), 138: 'An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed.' If this be an exact definition, then an act to change the penalty of murder or treason, previously committed, from death to a fine, would be void. But if even Marshall's terse language be as broad as Chancellor Kent declares it is, it includes the present statute; for, he says, it extends to laws passed after the act, and affecting a person by way of punishment for that act, either in his person or estate. 1 Kent's Com., 409. That is precisely the force ascribed to law against the plaintiff.

"These instances sufficiently exhibit the forms of expression adopted by judges and authors concerning *ex post facto* laws, and from them it is perceived that among mere verbal definitions, some reach the statute now under review, and some do not. But all authorities now agree that the constitutional phrase is not to be received in its literal sense, that it does not embrace all *ex post facto* laws, *i. e.*, all laws passed after the occurrences to which they relate; but its meaning is to be ascertained by considering the motives which prompted its adoption, and the spirit which it was designed to embody. No one can expect to indicate in advance, *currente calamo*, all the modes in which legislation may antagonize its beneficial purpose, and it must be left for judicial tribunals, actuated

[1] Stokes *v.* People, 53 N. Y. 164; Dowling *v.* State, 13 Miss. 664

diately changed if necessary to secure an impartial jury.[1] When the effect is to take away an important right, however,

by like motives and imbued with the same spirit, to pronounce, in the light of precedent decisions, upon each case as it shall arise. For the present inquiry, judgments already rendered, not *dicta*, seem to me to afford no uncertain guide, and to lead to the conclusion that the determination below was wrong.

"There is a line of cases which hold that laws regulating the mode of procedure in the prosecution of antecedent crimes are not *ex post facto*—with such legislation, so long as (to use the language of Judge Cooley, Const. Lim., 272) it does not dispense with any of those substantial protections with which the existing law surrounds the person accused of crime, no fault can be found. Of this class, I think, are the cases of Commonwealth *v.* Getchell, 16 Pick. (Mass.) 452, and Commonwealth *v.* Mott, 21 id. 492, which are cited as supporting the judgment now before us. The legislation in review was to this effect: A statute of 1827 enacted that a person convicted of a crime punishable by imprisonment, who had been before sentenced to like punishment, should be liable to confinement at hard labor not exceeding seven years, in addition to the penalty prescribed for his later offence, and the prosecution for this additional punishment was to be by a separate information. A statute of 1832 provided that no convict should be sentenced under the prior act, unless he should before have been twice sentenced and twice discharged from prison. A statute of 1833 repealed that of 1832, and substantially reenacted that of 1827. The defendant (Getchell) was undergoing his second imprisonment before, during, and after the existence of the act of 1832; and the court held that after its repeal, and before his discharge, he was liable to be sentenced to the additional punishment. This was the posture of affairs. When convicted, pending the act of 1827, he at once became liable to the additional prosecution; then the act of 1832 suspended the prosecution until he should have been discharged from prison; then the act of 1833 restored the permission to prosecute at once. The laws of 1832 and 1833 were manifestly mere regulations of the procedure. That of 1832 did not relieve the defendant from liability to prosecution and penalty, but simply stayed the prosecution (and that in a manner not at all beneficial to him) until his present imprisonment was ended. In Mott's Case, the second offence was

[1] Wh. Cr. Pl. & Pr. § 602; Gut *v.* State, 9 Wall. 35. That an act extending the period of limitation where the existing limitation has not run against the prosecution of a crime is not an *ex post facto* law, see Com. *v.* Duffy, 96 Penn. St. 506. A law defining two degrees of murder, and making the second punishable by imprisonment for life, is not *ex post facto* as to past offences, since the punishment for the first degree is left the same, and that of the second degree is a mitigation of the penalty inflicted by the former law. Com. *v.* Gardner, 11 Gray, 438. See, for other cases, in which change of procedure was held not unconstitutional though retrospective, State *v.* Arlin, 39 N. H. 179; Walter *v.* People, 32 N. Y. 147; Warren *v.* Com., 37 Penn. St. 45; Perry *v.* Com., 3 Grat. 632; State *v.* Sullivan, 14 Rich. L. 281; March *v.* State, 44 Tex. 64.

the statute will not be construed retrospectively; nor will a statute be sustained which undertakes to cure defects in prior criminal procedure.[1]

committed pending the act of 1827, but he was not convicted of it till after the act of 1833. It was decided that his case was not distinguishable in principle from Getchell's, and it is not evident how it could be. Chief Justice Shaw says that the act of 1832 was to meet cases of two sentences at the same term of court, and relieve them from the act of 1827; and it would have had that effect, for then there could have been liability under the early act by reason of the first sentence and second conviction, but there never could arise liability under the later act, because there could not be two discharges from prison. If such a case had come before the court, and as to that the law of 1833 had been held valid, the decision would have been in point here; but these cases are not. The following adjudications are, in principle, adverse to the judgment now before us, recognizing the notion that a statute substantially imposing punishment for a previous act which, without the statute, would not be so punishable, is an *ex post facto* law, although it may not be included in the letter of Judge Chase's rules. In State *v.* Sneed, 25 Tex. 66, a law which attempted to remove the bar of the statute of limitations was denounced as *ex post facto*. State *v.* Keith, 63 N. Car. 140, presented this point: After the prisoner's crime, an act of amnesty was passed, by force of which he was relieved from liability to punishment; subsequently this act was repealed by ordinance of the state convention; and then the prosecution was instituted. The court decided that the ordinance was an *ex post facto* law, because it made criminal (*i. e.*, punishable) what before the ratification of the ordinance was not so, and took away from the prisoner his vested right to immunity. Dr. Wharton (Crim. Pl. and Pr., § 316), borrowing almost the language of the court in People *v.* Lord, 12 Hun (N. Y.), 282, says: 'The statute [of limitation] is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offence.' On the other hand, it is urged that it is not permissible to consider such a statute as an amnesty or pardon, because these are always granted after the crime, and are intended to absolve the guilty, while that is enacted before the fact, and is designed to protect the innocent. Neither of these grounds of distinction seems to be stable. It is not the passage of the limitation law, but its maintenance unrepealed for the requisite period after the offence, which creates the amnesty, and its very terms indicate that the guilty, and not the innocent, were those the legislator had in view; it begins to run only on the 'committing of the offence.' True, an innocent man may set it up, but so he may a general amnesty. It is not inapt, then, to call the bar of such a statute an amnesty. But, name it as you will, at least the act of 1879 purported to do with the plaintiff what the North Carolina ordinance attempted to do with Keith, and for which it was

[1] *Infra*, § 610; Murphy, *in re*, 1 Woolw. 141; State *v.* Doherty, 60 Me. 501.

§ 474. It has just been said that the clause forbidding *ex post facto* legislation has been held to apply only to criminal

adjudged unconstitutional; it made punishable what before its passage was not so, and took from the plaintiff his vested right to immunity. In Hartung v. People, 26 N. Y. 167, this was the condition of things: The prisoner had committed murder, been tried, convicted, and sentenced to death, while the law provided that death should be the penalty, and the sentence of the court and the mode of fixing the time for its infliction. Then she had sued out a writ of error carrying the judgment to the court of appeals, and pending that writ the former law had been repealed, and a law enacted to the effect that all persons then under sentence of death should be confined at hard labor in the state prison for one year, and thereafter until the governor should issue his warrant for the execution of the sentence. On this writ of error, the court of appeals had decided that this change in the law rendered the judgment below erroneous, and had reversed it and ordered a new trial. 22 N.Y., 95. Afterwards a law was passed restoring the statute as it existed when the murder was committed. The court decided that as to her this last was an *ex post facto* law, and unconstitutional. It is true that, in reasoning upon the subject, the court adverts to the fact that, before the passage of the law, the defendant had been adjudged to be dispunishable for murder under laws then existing; but manifestly it was the fact that she had become dispunishable, and not the existence of any verdict or judgment, that gave this character to the subsequent law. The verdict or judgment might protect her from legislative reach because of some other fundamental principle; but interference with judicial proceedings has never been regarded as of the essence of *ex post facto* laws. It is by their effect upon the *status* of individuals that they are to be characterized. And such was the view of the court; for Chief Justice Denio, in delivering the opinion, said: 'By the repeal of the provisions of the revised statutes, and the trial and acquittal of the offender while such repealing law was in force, the act of the prisoner, though not innocent in a moral sense, would be dispunishable. A legislative act, restoring the repealed law, would have precisely the same effect as though the offence had not been punishable originally, but had been made so for the first time by the restoring act. Such a law would be, within the spirit of this constitutional prohibition, and would, in my opinion, be void.'

"In the same category is the case in hand. The law prescribing punishment for the plaintiff's crime had not, indeed, been repealed, but as to that offence it had expired, and so was as if repealed (Yeaton v. United States, 5 Cranch, 281); hence it was the same thing, with regard to that transaction, as if it had never existed. Surtees v. Ellison, 4 M. & R. 586; Kay v. Goodwin, 6 Bing. 582; Potter's Dwar. on Stat., 160. The plaintiff's act stood as though it had been perpetrated in the face of a statute which forbade it, but declared that he should not be prosecuted, tried, or punished for doing it. Then the act of 1879, restoring the expired law, had precisely the same effect as though the offence had not been punishable originally, but had been made so for the first time by the restoring act; such a law is within the spirit of the constitutional prohibition.

prosecutions. Statutes, therefore, modifying rules of evidence in respect to past cases cannot be objected to, in civil suits, as

In re Murphy, 1 Woolw. U. S. 141, the defendant had been convicted by court martial, at a time when he was subject to trial only in civil tribunals. On *habeas corpus*, Justice Miller said: 'If this act be valid, the prisoner must be detained. It is evidently intended to make two provisions, one to validate the punishment of offenders, which would otherwise be illegal. . . . So far as the first point is concerned, the law is unconstitutional, undoubtedly so; no clearer case of an *ex post facto* law can be found. . . . . The prisoner, up to the time of the passage of this law, was certainly illegally imprisoned, because tried by and held under the sentence of a court which had no jurisdiction of his person or of his offence. If he be remanded, it will be under an act passed subsequent to his offence and even to his conviction. Can any law be more clearly *ex post facto*?' So with the case of this plaintiff. It is sought to legalize his punishment (which would otherwise be illegal) by an act passed subsequent to his offence, without which he was free from lawful prosecution, not only in some of the courts, but in all courts; and by any methods such a statute is void. In addition to these decisions, the opinion of Dr. Wharton is well worthy of being cited. In a note to § 316 of Crim. Pl. and Pr., he does not hesitate to say that an act of congress, which undertakes to authorize prosecutions for offences which prior statutes of limitation have cancelled, is an *ex post facto* law, and hence void.

"The impolicy of keeping crimes, not of the deepest dye, punishable during the whole life of the offenders, is sufficiently indicated by the common usage of civilized nations in fixing a period for the limitation of criminal prosecution. The beneficent aims of such a usage are thwarted, if the limitation be not absolute and irrevocable. The injustice and oppression of laws repealing the limitation after persons have once relied upon its finality, must be apparent to all. The innocent, conscious of acts which, when only partially disclosed, may seem criminal, preserve the evidence of the whole truth until time has established the legal proof of innocence by barring prosecution. Then their vigilance relaxes, and their evidence is lost; what more unjust, than that now the legislature should abate their protection, and leave them to the hazard of half-discoverd facts? A guilty man, not wholly lost to honor and to hope, passes through the statutory period after his single offence, cowed by the constant dread of detection and disgrace. Then, relieved from danger, he returns to the path of rectitude, forms respectable associations, and gathers around him those who repose in his virtue and depend upon his fair fame. Now, the law changes; the detective drags to light his long-buried crime; and innocent and guilty alike are overwhelmed in a common ruin. It was of grace that remission was granted; it is the spirit of injustice and oppression that withdraws it. To forbid the exercise of such power, the mandate of the constitution stands. There is another aspect of this case, not presented upon the argument, but in which some members of the court think it appears that the judgment below is wrong. Statutes extending periods of limitation are not to be construed as designed to affect cases where the bar has already attached, unless no other reasonable interpretation can

conflicting with this provision; though such an objection might properly be raised in criminal prosecutions. If, however, such statutes would be unconstitutional in criminal suits as *ex post facto*, they might be regarded as unconstitutional in civil suits as impairing the obligation of contracts, or as taking property out of the due course of law. This, however, will be hereafter discussed.[1] It is sufficient here to state that in criminal cases a statute modifying evidence is not unconstitutional as to prior cases, provided it does not materially impair the defendant's rights.[2] But it is otherwise as to statutes making certain evidence absolute proof.[3] It has been held, also, that a statute to the effect that drinking spirituous liquors in a particular place shall be *prima facie* proof of sale is unconstitutional;[4] and so of a statute making notoriety *prima facie* proof of liquor-selling.[5] On the other hand, a statute throwing the burden of exculpation on persons in whose houses spirituous liquor is delivered has been held constitutional in Massachusetts;[6] and so of a statute making it the defendant's duty, in such case, to prove a license.[7]

Nor are laws modifying rules of evidence unconstitutional as to prior cases.

be applied. Angell on Lim., § 22, note. The act of 1879 is doubtless retrospective; but every word of it, save two, may have effect, and yet reach only past offences still subject to punishment when it was enacted. These two words make the prosecution legal, where 'the indictment has been found within five years from the time of committing the offence.' This provision is nugatory, unless it was meant to legalize indictments, theretofore found, more than two years after the crime. But this language does not reach the plaintiff's case; his indictment was found after the statute; and, under the rule, vigorously enforced, the law must be considered as not legalizing his prosecution. If necessary to avoid injustice I would so interpret it."

[1] *Infra*, §§ 494, 566.

[2] See Calder *v.* Bull, 2 Dall. 386; Seip *v.* Storch, 52 Penn. St. 210; Richter *v.* Cummings, 60 Penn. St. 441; State *v.* Beswick, 13 R. I. 211. That a statute removing incapacity from infamy is not *ex post facto* as to prior cases, see Sutton *v.* Fox, 55 Wis. 531. *Aliter* as to statute doing away with necessity of corroborating accomplice. State *v.* Bond, 4 Jones, L. 9. For further cases, see *infra*, § 494.

[3] *Infra*, §§ 494–566.

[4] People *v.* Lyon, 27 Hun, 180.

[5] State *v.* Beswick, 13 R. I. 211; but see State *v.* Thomas, 47 Conn. 546.

[6] Com. *v.* Wallace, 7 Gray, 222.

[7] Com. *v.* Kelly, 10 Cush. 69; see Com. *v.* Williams, 6 Gray, 1.

§ 475. In the constitutions of many states retrospective laws are specifically prohibited. And in all cases, when the effect of retrospective action is to unseat vested rights, statutes will be construed as having only prospective operation.[1]

Under state constitutions retrospective laws are unconstitutional.

XVIII. Laws Impairing the Obligation of Contracts.

§ 477. The tenth section of the first article of the constitution provides that "no state shall pass any law impairing the obligation of contracts." The motives which led to the introduction of this restriction were several: (1) The recklessness exhibited by some of the colonial legislatures in sanctioning by law the repudiation of contracts had greatly injured both the political and the business interests of the country at large. (2) Unrestrained interstate trade was one of the chief objects in the creation of the new government,[2] yet, unless contracts were protected from dissolution by state legislation, unrestrained interstate trade could not be assured. (3) Several of the leading members of the convention, among whom Dr. Franklin was conspicuous, were students of political economy, and had accepted the position that justice and expediency require that freedom of contract should be absolute.[3] It is neither right nor politic, so it was argued, that by legislation men should be prevented, unless in those extreme cases in which the object is immoral or illegal, from making such bargains with each other as their interests or sense of duty suggest. It is not for the public good, neither is it just, that this function should be taken from the field of individual enterprise and competition, and placed in the hands of the state. The wealth of the country is more fully brought out, its energies more effectively employed, if men are permitted, without government interference, to make what bargains seem most conducive to business success, provided there be no wrongful advantage taken, and no illegal or immoral object secured. The state, therefore, should be prohibited

Constitutional limitation prompted by political and business dangers.

[1] People v. Brooklyn R. R., 89 N. Y. 75; *infra*, § 610.

[2] *Supra*, §§ 418 *et seq.*

[3] *Infra*, § 365.

from interfering by legislation with this freedom of contract. It will be seen, therefore, that the restriction before us has two aspects: (1) That which protects contracts already made; (2) that which protects the general right to contract.—The distinction in this respect between our constitution and the British is marked by the fact, that while by the latter landbills divesting landlords' rights are sustained by the judiciary, in our system legislation providing for the extinction of antecedent irredeemable ground-rents is unconstitutional.[1] The same reasoning invalidates state legislation reducing interest on existing debts,[2] and state legislation relieving a bank from the duty of paying its debts in specie, and extending the time for the payment of such debts.[3]

Legislation impairing antecedent legal contracts invalid.

§ 478. Whatever we may say on the question hereafter discussed, as to the constitutionality of state legislation impairing the capacity to contract, there can be no question that the clause now before us makes invalid state statutes impairing, under the conditions hereafter expressed, the obligation of contracts which were in force at the time of the passage of such statutes.[4] Nor can the obligation of contracts be impaired by declaratory legislation.[5] How far it can be impaired by the changes of judicial opinion in state courts will hereafter be discussed.[6] Contracts, however, to be within the protection of this clause must be in themselves valid and binding. Hence the clause does not apply to contracts illegal or void from public policy;[7] nor to contracts which a state is precluded from making by its constitution.[8]

Limitation applies to contracts by state.

§ 479. What has been said applies to contracts entered into by the state as well as by individuals. Hence it has frequently been held that a grant by a legislature, for a consideration, of special privileges to an individual or a corporation, cannot be rescinded

[1] Palairet's Appeal, 67 Penn. St. 479; see *infra*, §§ 566-7.

[2] Roberts *v.* Cocke, 28 Grat. 207.

[3] Godfrey *v.* Terry, 97 U. S. 171.

[4] Whart. on Cont., §§ 1071 *et seq.*, and cases there cited, and cases cited *infra*, §§ 479 *et seq.*

[5] Koshkoning *v.* Burton, 104 U.S. 668.

[6] *Infra*, §§ 480, 526.

[7] Whart. on Cont., §§ 335 *et seq.*

[8] *Infra*, § 480, 603.

when the grant was one consistent with the policy of the law.[1] "When a state descends from the plane of its sovereignty and contracts with private persons, it is regarded, *pro hac vice*, as a private person itself, and is bound accordingly." A contract, therefore, between a state and a private person, by which he is to render certain services for a limited period for a fixed compensation, he not being a public officer, is a contract under the constitution.[2] The limitation applies as well to cases where the state contracts through an agent as where it contracts by its immediate representatives. "Where a state has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied."[3]

Indebtedness incurred in accordance with state law will be sustained by the supreme court of the United States, though there be contrary decision of state court.

§ 480. A difficult question arises when a state court has decided that a bond issued by a municipal or other local corporation is not in conformity with law, and an appeal is taken to the supreme court of the United States. Can the latter tribunal reverse on the ground of the inviolability of the contract incorporated in the bond? This has been held in cases where the bonds had been sustained by prior decisions of the state court, on the faith of which they were taken,[4] and even where there was no such prior decision, but where the supreme court of the United States held that the construction given by the state court to a statute, made that statute unconstitutional.[5] It has

[1] Fletcher *v.* Peck, 6 Cranch, 87; Terrett *v.* Taylor, 9 Cr. 43; McGee *v.* Mathis, 4 Wall. 143.

[2] Hall *v.* Wisconsin, 103 U. S. 5.

[3] Swayne, J., VonHoffman *v.* Quincy, 4 Wall. 535, adopted in Wolff *v.* New Orleans, 103 U. S. 358.

[4] Gelpcke *v.* Dubuque, 1 Wall. 175; Havemeyer *v.* Iowa Co., 3 Wall. 297; Chicago *v.* Sheldon, 9 Wall. 50. For a fuller discussion of these cases, see *infra*, § 526.

[5] Butz *v.* Muscatine, 8 Wall. 575. Burgess *v.* Seligman, 107 U. S. 20, was a case in which, subsequent to the construction of a statute by the Federal circuit court, another construction of the same statute was given by the state court. The supreme court of the United States held that they were not bound by the state decision, and affirmed the decision of the circuit court. Gelpcke *v.* Dubuque, and the line of cases to which it belongs, are cited to show that "when contracts and transactions have been entered into, and rights accrued thereon under a particular state of the decisions, or

also been said in New York (though the position was not necessary to the issue), that where obligations have been entered into on faith of decisions of the courts of another state, such obligations cannot be affected by subsequent conflicting decisions of such courts.[1] In Pennsylvania it has been held that this doctrine applies to title acquired in conformity with decisions of the Pennsylvania Supreme Court, even though that court subsequently changed its ground with regard to the point decided in such rulings.[2] But it cannot be denied that thus to place rights acquired on the faith of a decision of a court under the protection of the clause before us, may operate unduly to shackle the development of law,[3] as well as to establish in the same jurisdiction two distinct laws as to the same subject matter, *i. e.*, the old law as to contracts supposed to absorb it, and the new law as to other cases. The rule, if finally adopted, should be restricted to contracts incorporating a specific law in their terms.

Legislation rescinding grants of private

§ 481. It has been held that state legislation rescinding a prior grant of a private franchise or estate is unconstitutional, unless the right of such repeal is reserved in the grant.[4] This restriction has been

where there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued." Burgess *v.* Seligman is affirmed in Pana *v.* Bowler, 107 U. S. 529, cited *infra*, § 526.

[1] Jessup *v.* Carnegie, 80 N. Y. 441.

[2] Menges *v.* Dentler, 33 Penn. St. 495; Geddes *v.* Brown, 5 Phila. Rep. 180. This point, however, seems to be modified in Wright *v.* Brown, 44 Penn. St. 224; nor is it sustained in subsequent cases, though there must have been many instances in which, on the court changing the prior law, titles acquired under such prior law must have been open to question; see article by Mr. Henry Reed in Amer. Law Rev., Apr. 1875, and *infra*, § 526. See, also, Daly *v.* Maitland, 88 Penn. St. 384, as apparently conflicting with Menges *v.* Dentler, and other cases cited 9 Amer. Law Rev. 405; though see Wickersham *v.* Savage, 58 Penn. St. 365, apparently relying on Menges *v.* Dentler. As criticizing Gelpcke *v.* Dubuque, see Holman, *ex parte*, 28 Iowa, 88, 165; Chamberlain *v.* Burlington, 19 Iowa, 395, and an able article by Mr. Wm. M. Meigs, in the Southern Law Review for December, 1882. That a contract made subject to a particular law may be assumed to incorporate in its terms that law, see Whart. Conf. of Laws, §§ 427, 431.

[3] See *supra*, §§ 22 *et seq.*; and see, also, *infra*, § 596.

[4] See Durkee *v.* Board of Liquidation,

franchises or of estates may be invalid.

applied to a law withdrawing or materially modifying educational privileges granted in a charter.[1] Bank charters are held to be within the same category, so far as such charters contain any private grants;[2] and so are engagements by the state in railroad charters, by which the state agrees to grant private domain or other private rights to the company in consideration of its outlay of funds;[3] and so, generally, are state railroad charters.[4]

Stipulation not to tax may bind.

§ 482. Whether any one legislature, by granting a charter relieving a chartered corporation from taxation, can preclude future legislatures from taxing the corporation, is, as has been seen, a question of much interest. That such an exemption binds during the term of the charter has been repeatedly affirmed.[5] On the other hand, as is said by Chief Justice Parker, of New Hampshire, it "may well deserve consideration whether this power (that of

103 U. S. 646; Keith v. Clark, 97 U. S. 454; University v. People, 99 U. S. 309.

[1] Dartmouth College v. Woodward, 4 Wheat. 518; Vincennes Un. v. Indiana, 14 How. 268; McGee v. Mathis, 4 Wall. 143; Cal. Co. Grammar School v. Burt, 11 Vt. 632; Brown v. Hummel, 6 Barr, 86.

[2] Gordon v. Tax Court, 3 How. 133; Planters' Bank v. Sharp, 6 How. 301; Curran v. Arkansas, 15 How. 304; Keith v. Clark, 97 U. S. 454; People v. Manhattan Co., 9 Wend. 351; State Bank v. Bank of Cape Fear, 13 Ired. 75.

[3] Whart. on Cont., § 1063; Greenwood v. Freight Co., 105 U. S. 13.

[4] Greenwood v. Freight Co., 105 U. S. 13; see *infra*, § 488.

That a lien on the tolls of a canal, given by a statute, cannot be divested by a subsequent statute, see Wabash Co. v. Beers, 2 Black, 448. That a statute making stockholders liable for debts cannot be repealed by a subsequent statute so as to impair the claims of antecedent creditors, see Hawthorne v. Calef, 2 Wall. 10.

In the following cases rights secured under charters have been held to be impaired:—

Restriction of right granted in charters to make subscriptions. State v. Greene Co., 54 Mo. 540; Osage Valley R. R. v. Morgan Co., 53 Mo. 156.

Restriction of right to charge a specific interest. Hazen v. Bank, 1 Sneed, 115.

Withdrawal of banking powers. Planters' Bank v. Sharp, 6 How. 301.

[5] Gordon v. Tax Court, 3 How. 133; Home of the Friendless v. Rouse, 8 Wall. 430; Wilmington R. R. v. Ried, 13 Wall. 264; Erie R. R. v. Penna., 15 Wall. 282; University v. People, 99 U. S. 309; Asylum v. New Orleans, 105 U. S. 362; Iron City Bank v. Pittsburgh, 37 Penn. St. 340; Com. v. Pottsville Water Co., 94 Penn. St. 516; see cases cited in Wade on Retroactive Laws, § 95.

As to limits of taxation, see *supra*, § 404.

taxation) is not inherent in the people under a republican form of government, and so far inalienable that no legislature can make a contract by which it shall be surrendered without express authority for that purpose in the constitution."[1] This authority, however, such is the prevalent view, does not exist in state legislatures unless the right, as is now almost universally the case, is restrained by constitutional limitation. But to sustain, an exemption, the intention to grant it must be clearly expressed.[2]

Growing doubts as to perpetuity of grants of franchises.

§ 483. It was in the Dartmouth College Case, as cited above, that the doctrine of the inviolability of private charters under the constitution was most broadly asserted; but it would be unjust to pass over the fact that there is a growing tendency to doubt the correctness of the general rule laid down in that famous case, so far as it involves the assertion that a state cannot recall a franchise granted to a private corporation or modify grants made to such a corporation.[3] The reasons for this tendency are as follows:—

(1) The case was imperfectly argued.[4] The point of the conflict of the obnoxious statute with the constitutional limitation as to contracts, was discussed with comparative brevity by Mr. Webster, and was scarcely thought worthy of notice by Mr. Wirt, who was on the other side. At first only two judges, Chief Justice Marshall and Judge Washington, regarded it with favor; and it was viewed by the bar in general as rather in the nature of a chance suggestion than as a position on which the appellant's case was to rest. It was

[1] Brewster *v.* Hough, 10 N. H. 138; see Mott *v.* R. R., 30 Penn. St. 9; Railroad *v.* Georgia, 98 U. S. 359.

[2] U. S. *v.* Memphis, 97 U. S. 284.

In Railroad Company *v.* Gaines (97 U. S. 697) it was held that exemption from taxation cannot be granted when the state constitution provides that all property is to be uniformly taxed. See Williams *v.* Louisana, 103 U. S. 637; cited *supra*, § 480.

As to what uniformity of taxation means, see *supra*, § 404.

[3] See *supra*, §§ 389, 390.

[4] See a narrative of the circumstances attending the case in Lodge's Life of Webster, pp. 79 *et seq.*; and as to the details of the political influences operating both on the supreme court of New Hampshire and the supreme court of the United States, Shirley's History of Dartmouth College Cases (1879), pp. 207 *et seq.*

not until during the recess that intervened between the argument and the decision, that public attention was aroused to the momentous issues involved in the position. It was then felt by the authorities of New Hampshire, and by the parties interested in the new grant, that their case, in view of the suggestions thrown out at the hearing by the chief justice, had not been fully presented so far as concerned the questions of constitutionality. Mr. Pinkney, then regarded as unsurpassed at the bar as a constitutional lawyer, was consequently retained by them to apply for a reargument at the opening of the next term of the court, no decision having as yet been pronounced. When the court reassembled, Mr. Pinkney, therefore, applied to be heard on the question of constitutionality. The application was refused by the chief justice because, as he said, the case had been decided. Three additional judges had, during the recess, acceded to the views of the chief justice, and in this way a majority of the court had been secured to affirm the unconstitutionality of the New Hampshire statute. No doubt this result was not reached without careful discussion, for Judge Story was one of the judges who first held the statute under investigation constitutional, and then changed his mind. But no discussion on the bench can be a substitute for a discussion at the bar; and particularly is this the case when the discussion is under the presidency of a chief justice of gifts so majestic and of will so imperious as was Chief Justice Marshall. And it is to be particularly regretted that a question of such magnitude as this, on which both Mr. Webster and Mr. Pinkney were engaged, should have been decided without any argument from Mr. Pinkney, and with an argument from Mr. Webster which was rather suggestive than expository. That when political issues are forced on a judge, judges are governed by their political convictions, has been already illustrated;[1] and it was a peculiar misfortune that the Dartmouth College question should have been presented to the court as a political issue of supreme moment. The remodelling of its charter by the New Hampshire Legislature, so it was urged by Mr. Web-

[1] *Supra*, §§ 389, 390.

ster. was a measure based on those theories of social disorganization and of state rights which the principles and traditions of the judges called on them peremptorily to rebuke. If Mr. Pinkney, himself a Federalist, had been allowed to reply, he might have shown that the right of parliament to remodel educational foundations had always been regarded in England as essential to salutary conservatism; and that state legislatures, if invested with the power of granting irrevocable franchises and establishing perpetual monopolies, so far from having their power, as was claimed, reduced, would be thereby made the most potent legislative bodies of the world. For this power belongs neither to the British Parliament nor to the congress of the United States.[1]

(2) The policy of irrevocably granting away public franchises, and fixing social rights in a constant perpetual mould, has become far more questionable with the lapse of years than it was at the time the business of the country was only slowly recovering from the paralysis produced by the war of 1812;[2] when, in fact, as to machinery or facilities of transportation, there had been no material change since the constitution had been adopted. In those days, therefore, when an apparently permanent type had been assumed by society, there was nothing startling in the position that an adjustment of social rights made by any particular legislature should bind forever. Now, however, we have been taught by the great inventions of steam and of the telegraph, by the marvellous improvements of machinery by which industries of all kinds have been remodelled, and by the introduction of new staples displacing old, that the stationary and apparently immutable condition of society during the first quarter of the present century was exceptional, and that the normal type of social life, as of all other kinds of life, is mutability tending to development.[3] If so, that which is by its nature mutable cannot by legislation be placed in an immutable mould. So far as concerns the right to continue on a particu-

[1] "Acts derogatory from the power of subsequent parliaments bind not." Blackstone Com., cited Steph. Com. I. 78.

[2] See *supra*, §§ 19, 22, 360.

[3] See *supra*, §§ 86, 114.

lar basis an educational institution, there being no claim that it is invested with exclusive educational prerogatives, the continuing authoritativeness of the decision in the Dartmouth College Case may be affirmed. But so far as that decision asserts the general inviolability of private charters, that it is in conflict with the general policy of the country, if not with the necessary conditions of social life, is evidenced by the fact that there is now scarcely a state in the country which has not provided by constitution or general legislation that all charters granted after the adoption of such provision are to be open to amendment or repeal. How far the general principles laid down in the Dartmouth College Case have been modified by the supreme court will be considered in future sections. It may, however, be said, that though no state constitutional amendment can affect prior charters under the protection of the Federal constitution, yet as to all other charters, the principle, under the new legislation, is that mutable conditions cannot be bound by immutable laws. English statutes, modifying charters, *e. g.*, the statutory modifications of the charter of the East India Company cannot, it is true, be cited as precedents on the question of constitutionality, since in England there is no constitution to whose limitations parliament is compelled to bow. But such statutes, various and numerous as they are, may be appealed to as showing that, so far as concerns principle, the rule adopted in our recent state constitutions is the same as that which is recognized as right and just in England. That rule is that business franchises granted by the legislature can, in all cases, be recalled and modified when the public interests require, provided that in this way private property is not taken without adequate compensation. In other words, the principle, as heretofore stated,[1] is, that interests, in their essence mutable, cannot, subject to the right of compensation when private property is taken, be made immutable by statute.[2]

[1] *Supra*, §§ 27 *et seq.*

[2] See, also, *supra*, §§ 86, 114.

Were a restriction, like that before us, imposed on the British constitution, British economical growth would have been stopped. There is scarcely an abuse existing, or that has existed within the last century in Great Britain,

Distinction between temporary and perpetual engagements.

§ 484. An important practical distinction is to be noticed between (1) a contract to do a thing within a limited reasonable time, and (2) a perpetual contract, or the grant of a franchise for a long term of years. To the first is applicable the rule that, the parties standing on an equal footing, the engagement of each party is to be construed in the sense in which he knew the other party accepted it; and such engagements, therefore, are to be construed, under the protection of the limitation before us, favorably, in questions of doubt, to the party privileged.[1] These contracts, so it may be argued in defence of this view, are, from the nature of things, ephemeral and tentative; the contracting parties soon pass away, even if the contract is not before such period dissolved by its own limitations. But a grant of franchises from the state may, under the shelter of the provision before us, be of long, if not perpetual, continuance. No matter how great may be the change of surrounding circumstances, or how injurious these privileges may become to the community as a whole, they may continue to exist if so protected. Hence it becomes important, in applying this restriction, to keep in mind the rule that, when there are two equally probable constructions of a charter by a sovereign, the construction which parts with the least portion of sovereignty is to be preferred.[2]

§ 485. It is in any view conceded that state grants to municipal corporations, and to other public corporations for public purposes, may be revoked or modified by legislation, such

that has not had legislative sanction, and that does not involve contractual rights; and in such cases, *e.g.*, that of the Irish Church and of the East India Company, remedial legislation, such as actually took place, would have been unconstitutional had parliament been placed under limitations such as those presented in the Dartmouth College Case. In this country the disaster arising from attaching immobility and fixity to the legislation of any particular period has worked less injuriously, from the fact that our charters are comparatively recent, while some of those which came up for revision in England were granted several centuries ago. And the evil is in a large measure cured with us by the judicial and legislative action above stated.

[1] *Infra*, §§ 609, 615.

[2] Whart. on Cont., § 666. That this applies to statutes, see *infra*, § 615.

grants not being contracts within the sense of the limitation.[1] It is otherwise as to grants of private property to such a corporation in consideration of certain things to be done by it for the public benefit.[2] The distinction is that while property transferred for a consideration to a municipal corporation cannot be recalled by the state, the mode of the public use of such property can be controlled by legislation; and to this control are subjected all franchises given to a municipal corporation for public use.[3] In conformity with this distinction, it has been held that a state law is void which withdraws the taxing power of a city so as to preclude her from complying with engagements made on the faith of such power.[4] But legislative modifications of the taxing power given to a municipal corporation are not unconstitutional;[5] nor is a change of the boundaries of such corporation as fixed by charter.[6]

Grants to municipal corporations may be revoked.

§ 486. A license from the state, when it regards a matter under police control, is not a contract in the sense of the limitation before us; and hence such a license (*e. g.*, a license to sell spirituous liquors), even though a moneyed consideration was paid for it, may be withdrawn by the state when required by public policy.[7] And it has been held that a state can withdraw the right to sue, given to its

License may be withdrawn.

[1] Terrett *v.* Taylor, 9 Cranch, 43; People *v.* Morris, 13 Wend. 325; People *v.* Pinckney, 32 N. Y. 377; Trustees *v.* Tatman, 13 Ill. 27; Wallace *v.* Sharon, 84 N. C. 164.

[2] Ibid.; Fort Plain, etc. Co. *v.* Smith, 30 N. Y. 44.

[3] East Hartford *v.* Bridge Co., 10 How. 511; Wallace *v.* Trustees, 84 N. C. 164.

[4] Wolff *v.* New Orleans, 103 U. S. 358.

[5] Gutzweller *v.* People, 14 Ill. 142; see Brighton *v.* Wilkinson, 2 Allen, 27; Girard *v.* Phila., 7 Wall. 1.

[6] Wade *v.* Richmond, 18 Grat. 583; Stilz *v.* Indianapolis, 55 Ind. 515.

[7] Piere *v.* New Hampshire, 5 How. 554; Phalen *v.* Virginia, 8 How. 163; Beer Company *v.* Massachusetts, 97 U. S. 25; Adams *v.* Hackett, 7 Fost. 289; Calder *v.* Kurby, 5 Gray, 597; Herin *v.* State, 1 Oh. St. 15; Metropolitan Board *v.* Barrie, 7 Tiff. 657. See Johnson *v.* Crow, 87 Penn. St. 184, where it was held that a legislative grant of exclusive privilege in a ferry may be repealed when not founded on a valuable consideration; and see Dyer *v.* Bridge Co., 2 Port. 296. As to the general right to withdraw licenses, see Stone *v.* Mississippi, 101 U. S. 814, and other cases cited in Wade on Retroactive Laws, § 63.

creditors, without impairing the obligation of contracts made by it with such creditors.[1]

Charter no protection to a nuisance.

§ 487. A charter or license from the state is no defence to an indictment for a nuisance, or for any other offence against public comfort and decency, when such nuisance is not necessary to the discharge of functions authorized by the charter.[2] The police power extends "to the protection of the lives, health, and prosperity of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects."[3] On the same reasoning, a license to open a lottery may be constitutionally withdrawn.[4]

Charters and grants restrictive of freedom of business and travel may be rescinded.

§ 488. As, is elsewhere shown, agreements to surrender inalienable rights are void;[5] and this rule has been applied to agreements to withdraw absolutely from business;[6] to agreements not to labor except at a certain price, or for a particular person;[7] to agreements to absorb transportation, or to monopolize a particular necessary staple;[8] and to agreements by railroad corporations to give special advantages to particular persons.[9] Whether a state may grant to an individual or to a corporation a monopoly of privileges, which of right belong to the community at large, is a question of great delicacy, though

[1] Railroad Co. *v.* Tennessee, 101 U. S. 337; Railroad Co. *v.* Alabama, 101 U. S. 832; and see cases cited *infra*, § 493.

That in matters of police or business necessity the promotion of the general welfare of the community justifies the modifying of a grant, see Phalen *v.* Virginia, 8 How. 163; Beer Company *v.* Massachusetts, 97 U. S. 25; *supra*, §§ 420–1. That a state cannot bar itself from the use of its right of eminent domain; Cooley, Const. Lim. 164; *infra*, § 572. As to right of police modifications, see U. S. *v.* De Witt, 9 Wall. 41; U. S. *v.* Reese, 92 U. S. 214; *infra*, § 565. As to police restrictions on railroads, see Davidson *v.* State, 4 Tex. Ap. 545. That a state may modify a grant for cemetery purposes when required by increase of population, see Brick Church *v.* N. Y., 5 Cow. 538.

[2] Whart. Crim. Law, 8th ed., § 1424; Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; *infra*, § 565.

[3] Bradly, J., Beer Co. *v.* Mass. 97 U. S 33, citing Boyd *v.* Alabama, 94 U. S. 645.

[4] Stone *v.* Mississippi, 101 U. S. 814.

[5] Whart. on Cont., § 430.

[6] Ibid. §§ 431 *et seq.*

[7] Ibid. § 440.

[8] Ibid. §§ 442, 442*a*.

[9] Ibid. § 414.

the preponderance of opinion is that such grant may be made temporarily when required by public exigency. On the other hand, the inclination of authority now is, that when such public exigency ceases to exist, and when the operation of the grant is to prejudicially restrain business freedom in the community at large, or to impose pernicious limitations on common law rights, the grant may be recalled.[1] It is true that it has been ruled by the supreme court of the United States that a condition in a bridge charter, prohibiting the building of other bridges within the range of two miles, is a contract which the state cannot rescind.[2] But it may be replied that if such a guaranty turns out to conflict with inalienable rights of the people at large, or to be unduly restrictive of trade, it may, when such conflict transpires, be recalled.[3] To this effect may be cited the more recent rulings of the supreme court of the United States, to be presently noticed, that it is within the power of state legislation to prescribe restrictions, not in themselves unreasonable, on the charges of the proprietors of grain elevators and of railroad corporations acting as common carriers under charters granted by the state.[4]

§ 489. An individual, if he has entered into a contract which is against the policy of the law as unduly restrictive of business, may, as we have seen, on an application to a court of equity, have it rescinded on putting the other party in *statu quo*;[5] and it would be strange if the privilege granted in this respect to private citizens, should be refused to the state which, in such matters, acts as trustee for the whole community. There is another ground on which this prerogative, essential as it is to the business growth of the country, may be rested. The power to regulate commerce is, as we have seen, given to congress; and it is within

State control over oppressive charters may be justified on the ground that it is a regulation of commerce.

[1] See Thorpe *v.* R. R., 27 Vt. 140; People *v.* Boston, etc. R. R., 70 N. Y. 569; Toledo, etc. R. R. *v.* Jacksonville, 67 Ill. 37, and cases hereafter cited; and see Wade on Retroactive Laws, § 19.

[2] Binghamton Bridge, The, 3 Wall. 51, three judges dissenting.

[3] See West River Bridge *v.* Dix, 6 How. 507; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; see S. C., 7 Pick. 344.

[4] Munn *v.* Illinois, 94 U. S. 113, and other cases in same volume; Sinking Fund Cases, 99 U. S. 700, 719.

[5] *Supra*, § 488; see Whart. on Cont., §§ 430 *et seq.*

the power of congress either to take the function of regulation in its own hands, or, as is the case in respect to matters peculiarly local, to permit the function to be exercised by the particular state whose local interests are most involved. This, as we have seen, is the practice adopted with regard to pilotage and wharfage.[1] Congress could no doubt take under its control pilotage and wharfage. It has not done so, but has left these important functions under state control. Hence, it has been held that state laws regulating pilotage and wharfage are constitutional.[2] There is no reason why, on the same grounds, it should not be held constitutional in the states to regulate the terms of the great agencies of interstate transit. A railroad is as much an avenue of commerce as is a navigable river, and there are some railroads in the United States which carry a far greater amount of travel and of freight than do either the Hudson or the Mississippi. The power of congress over commerce on the ocean, so far as concerns American shipping, is unquestioned; and equally unquestioned should be the power of congress over the railroad system of the United States, so far as it does not operate exclusively within the range of a state. But if congress can regulate this class of commerce, then it can commit to the particular states the making of such regulations, so far as concerns their own limits, for the same reasons that it commits the regulation of pilotage and wharfage to the states. It is true, that to this it may be replied that the prerogative in question, on the above reasoning, can only be exercised by the states in connection with interstate communication. This may be conceded; and yet this would not preclude a state, so long as congress does not intervene, from regulating any railroad, within its boundaries, which forms part of a system of interstate carriage.[3]

[1] *Supra*, § 424.

[2] Ibid.

[3] As sustaining the right of a legislature to regulate fares on railroads within its borders, see Winona, etc. R. R. *v.* Blake, 94 U. S. 180; Chicago R. R. *v.* Iowa, 94 U. S. 155; Chicago R. R. *v.* Ackley, 94 U. S. 179; Shields *v.* Ohio, 95 U. S. 319; People *v.* Boston R. R., 70 N. Y. 569; Chicago R. R. *v.* People, 67 Ill. 11; Wabash R. R. *v.* People, 105 Ill. 236; Sloan *v.* R. R. 61 Mo. 24.

In People *v.* Boston R. R., 70 N. Y. 569, the right to regulate the price to be paid

§ 490. It is true that by the supreme court of the United States the rights of the states in this re- Danger of resting function on

railroad companies for transportation was held to be "within the domain of legislative power, although the power to alter or amend the charters of such corporations has not been reserved;" the reason given being that railroad corporations hold their property and exercise their functions for the public benefit.

The question of legislative adjustment of railroad fares is discussed with much ability in Buckalew on the Constitution of Pennsylvania, 285 *et seq.*

In Ruggles *v.* Illinois, Sup. Ct. U. S. 1883, it was held that a provision in a charter giving a railroad corporation power to make by-laws and "establish such rates of toll for the conveyance of persons and property upon the same as they (the directors) shall, from time to time, by their by-laws determine, and to levy and collect the same for the use of the said company," is not to be construed so as to allow the directors to fix and collect tolls beyond the rates allowed by the laws of the state. In the opinion of the court, by Waite, C. J., the law is thus stated:—

"In Chicago, Burlington, and Quincy R. R. Co. *v.* Iowa, 94 U. S. 155; Peik *v.* Chicago and Northwestern R. R. Co., ib. 164; and Winona and St. Peter R. R. *v.* Blake, ib. 180, it was determined that 'a state may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter.' The right to a reversal of the present judgment rests on the question whether this company has any such restraining contract, and that depends on the effect to be given the amending § 6. The company by its original charter was authorized to transport passengers and property and to receive compensation therefor. This, if there had been nothing more, would, under the rule stated in Munn *v.* Illinois, 94 U. S. 113, and the several railroad cases decided at the same time, require the company to carry at reasonable rates, and leave the legislature at liberty to fix the maximum of what would be reasonable. So that, laying aside the limitations of the old charter, the question here is whether the amending section relied on has the effect of taking away from the state this power of legislative regulation.

"The amending section provides that the company 'shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interest of the company: Provided, that the same be not repugnant to the constitution and laws of the United States, or of this state, or repugnant to this act.' By § 5 all the powers of the company were vested in and could be exercised by the directors. Clearly under this authority no by-law can be established by the directors that does not conform to the laws of the state, and this, whether the laws were in force when the amended charter was granted or came into operation afterwards. The power of the company for the regulation of its own affairs was thus in express terms subjected to the legislative control of the state."

In Carton *v.* Illinois Central R. R. Co., 59 Iowa, 148 (1882), an act of the state legislature, whose object and purpose is to control and regulate the shipment of freight to points in other

the right of states to control business.

spect are placed on what may at the first glance appear to be broader ground. "Under these powers" (those of police), said Chief Justice Waite, when affirming the right of a state legislature to regulate the charges of grain elevators,[1] "the government regu-

states, was held to conflict with the Federal constitution, as being legislation on interstate commerce, a subject which is in its nature national, and requiring the exclusive legislation of congress. Hence it was ruled that an interstate contract of shipment, entered into by a common carrier, is an entire contract, and the laws of the state wherein it is made, so far as they attempt to regulate interstate commerce, do not enter into it as a part of the contract, being repugnant to the Federal constitution. See a note on this case by Mr. Ewell in Am. Law Reg. for June, 1883.

That a statute imposing liability for fires started by locomotives is not unconstitutional, though retroactive, see Lyman *v.* R. R., 4 Cush. 288; and so of statutes restraining railroads from laying their tracks near public highways; Portland R. R. *v.* Boston R. R., 65 Me. 122.

[1] Munn *v.* Illinois, 94 U. S. 113.

The dissenting remarks of Field, J., are worthy of grave consideration: "There is no business or enterprise involving expenditures to any extent which is not of public consequence, and which does not affect the community at large. There is no industry or employment, no trade or manufacture, and no avocation which does not, in a greater or less extent, affect the community and in which the public has not an interest in the sense used by the court." Stone *v.* Wisconsin, 94 U. S. 181, 185.

"The public," said he again, "is interested in the manufacture of cotton, woollen, and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community in which the public has not an interest, in the sense in which that term is used by the court." Munn *v.* Illinois, 94 U. S. 141. The principle of this case, he held, was "subversive of the rights of private property."

In Spring Valley Waterworks *v.* Bartlett (16 Fed. Rep. 615) it appeared that a corporation known as the Spring Valley Waterworks was organized under the statute of 1858, which provided that the price of the water furnished to San Francisco and its citizens should be fixed annually by two persons appointed by the city, two by the corporation, and one to be chosen by the other four; and in case the four could not agree, the other to be appointed by the sheriff of the county. The fourteenth article of the constitution of California, afterwards adopted, changed this mode without the consent of the corporation, and provided that the price of the water should be fixed annually by the board of supervisors of the city and county alone, giving the corporation no voice in the matter. It was held, (1) upon the authority of the Elevator and Granger Cases, in the supreme court of the United States, that said article of the state constitution is not void, as taking private property for public or private use without

lates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc.; and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the states upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. . . . Looking then to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale, more than two hundred years ago, in his treatise De Portibus Maris (1 Harg. Law Tracts, 78), and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." Limiting these expressions to the interstate transport of property and persons, and to the police regulations of whatever is likely to be a common nuisance, the doctrine thus stated may be generally accepted for the reasons given in the preceding section.[1] It is possible, however, that the effort may be made to give the words of Chief Justice Waite a far wider meaning. It

compensation, or without due process of law, or as conferring the sole power to fix the price upon the purchaser; (2) that, under the decision in the Sinking Fund Cases, it does not impair the obligation of a contract, within the meaning of the several provisions of the constitution of the United States relating to those subjects.

[1] See, also, as to police regulations superseding constitutional restrictions, *infra*, § 565, *supra*, §§ 425, 486–7.

may be said that they determine that the state legislatures have the power to regulate the prices of all transactions "of public consequence" which "affect the community at large;" and it may be urged that as all business transactions affect the community at large, state legislatures have the power to regulate all business transactions by fixing their prices and determining when their performance shall be imperative. Not only, it may be insisted, for instance, has the legislature the right to determine what a baker is to receive for his bread, but it has the right to determine when the baker shall bake, and what persons shall be bakers. To this, however, the following points may be made in reply: (1) The cases before the court are cases involving interstate commerce, the regulation of which belongs to congress, or, with the assent of congress, in matters distinctively local, to the states. And the court took pains, in one of the same group of cases, to exclude the assumption that absolute power over business was to be given to the states. "That government is the best," said the chief justice, "which, while performing all its duties, interferes the least with the lawful pursuits of its people."[1] (2) The constitutional limitation before us prohibits state legislation impairing the obligation of contracts; and the obligation of contracts would not only be impaired, but destroyed, if the legislature had power by sweeping statutes to impose contractual duties, and determine contractual terms. (3) For the legislature to say what prices commodities are to bring is virtually to take property without due process of law.[2] It may be said, in answer, that these objections apply equally to the position that the states, in default of action by the general government, have the power to regulate commerce, and, independently of the Federal constitution, have police authority which covers the adjustment of prices. But to this the following answers may be made: (1) There is a great difference between regulating commerce and regulating business. "Regulating commerce" is a technical term, which is interpreted to mean interstate and foreign trade. "Regulating business," on

[1] Chicago, etc. R. R. *v.* Iowa, 94 U. S. 155, 162; see *supra*, §§ 27, 365.

[2] *Infra*, §§ 564 *et seq.*, 588.

the other hand, has a wider signification; and if a state has absolute power to regulate business within its borders, our state governments are no longer constitutional, but absolute; and the legislature of New York, or the legislature of Texas, has as unrestricted power as has the parliament of Great Britain. It is consistent, however, neither with the genius of the people, nor with the restrictions of the Federal constitution, that the state legislatures should be thus absolute. There are many reasons why such absolutism should not exist.[1] State elections are usually annual; in many states a single election will carry with it executive and both branches of the legislature; if the legislature is absolute, a sudden and transient popular shock could destroy at one blow necessary industries, and break up that freedom of trade, reciprocal confidence, and expectation of stability, which are essential to public prosperity and private contentment. Nor is it impossible to drop out of consideration the fact that the determination of business duties is without the range of legislation. Even if a state had the power to fix prices and to impose business duties, while it could do much by such legislation to disturb and destroy, it could not establish.[2] (2) The exception of police regulation is of unquestionable validity; but it must be remembered that the term "police" has a settled meaning, and that business in the common sense of the term is not and cannot be a matter of police regulation. Broadly considered, it may be said that nothing that is not indictable as a nuisance is a matter of police regulation; and as to what are nuisances, under the common law, the lines of demarcation are clear and deep. It may be answered that many matters of police action, *e. g.*, negligent storing of gunpowder, are made so by statute; and if a statute can create jurisdiction of this kind in one case, it can do so in all cases. But the answer is, that police statutes do not create new police offences, but are simply affirmatory of the common law. A statute, for instance, imposing a severe penalty on the negligent storing of gunpowder is simply affirmatory of the common law by which such storing is a nuisance. The penalty may be new and special; but the thing to be punished

[1] See *supra*, § 365; *infra*, § 595. [2] See *supra*, § 27.

was punishable at common law before the new penalty was imposed on it. Where a statute goes beyond this limit, and makes a business penal which was not penal at common law as a nuisance, such statute is unconstitutional, if not as impairing the obligation of contracts, at least as taking away rights without due process of law.[1] And by the fourteenth amendment to the constitution, the states are now prohibited from passing statutes which would have the effect of unjustly impairing private rights.[2]

When right of amendment is reserved, charter can be amended without infringing on the provision.

§ 491. In the constitutions of some of the states the right is reserved of amending or repealing all charters granted by the legislature. Where there is no constitutional provision a clause to this effect is now introduced into most charters. Such reservations are not precluded by the Federal constitution.[3] But where the power to repeal or modify a charter is reserved, and the charter is repealed or modified by the legislature in accordance with such reservation, the rights of the parties interested in the corporation cannot in this way be destroyed by the state without compensation. Such rights, though not protected under the clause of the constitution now before us, are protected under the clause which prohibits the taking private property without compensation.[4] Nor can the rights of the corporation in its property be in this way in other respects impaired.[5]

[1] See *infra*, §§ 564 *et seq.*, 594–6.

[2] See *infra*, §§ 588, 594–6.

[3] Com. *v.* Eastern R. R., 103 Mass. 254; Railway *v.* Philadelphia, 101 U. S. 528; Murray *v.* Charleston, 96 U. S. 432; Railway Co. *v.* Georgia, 98 U. S. 359; Beer Co. *v.* Massachusetts, 97 U. S. 25; Greenwood *v.* Freight Co., 105 U. S. 13; Stanley *v.* Stanley, 26 Me. 191; Jones Man. Co. *v.* Com., 69 Penna. St. 137; Harper *v.* Ampt, 32 Oh. St. 291.

Under a general statute providing that all private charters afterwards granted may be amended, chartered privileges granted in a charter subsequent to such statute may be modified. Railway Company *v.* Georgia, 98 U. S. 359.

[4] *Infra*, §§ 564 *et seq.*; Buckalew on Const. of Penna., 256; Detroit *v.* Plank Road, 43 Mich. 140; see Close *v.* Glenwood, 107 U. S. 466.

[5] Santa Clara *v.* R. R., 18 Fed. Rep. 385; see *infra*, §§ 588, 594.

That the states, under such reservation, may repeal and modify charters subject to the limitations of the fourteenth amendment (*infra*, §§ 588, 594); see Shields *v.* Ohio, 95 U. S. 319; Sinking Fund Cases, 99 U. S. 700; Bangor R. R. *v.* Smith, 47 Me. 34;

§ 492. Laws modifying remedies on a contract are not to be ordinarily regarded as laws impairing its obligation.[1] Hence, it has been held within the power of state legislatures to modify process for antecedent debts; as where imprisonment for debt has been abolished.[2] The courts, also, have sustained laws modifying the duration and effect of antecedent liens, without touching the contract on which such liens rest;[3] laws exempting special items of property from execution for antecedent debts, when such items are only exceptional;[4] laws requiring acknowledgment of antecedent mortgages and deeds;[5] laws curing defects in judicial or administrative proceedings;[6] laws establishing the statutes of limitations as to civil suits; though not laws reviving a debt already barred;[7] laws making married women liable;[8] laws giving a right of appeal not previously existing;[9]

Laws modifying remedies are not unconstitutional.

Lothrop *v.* Stedman, 42 Conn. 583; Com. *v.* Fayette Co. R. R., 55 Penn. St. 452; New Orleans *v.* Asylum, 31 La. An. 292. That this reserves the right to impose taxation on property previously exempt, see Hewitt *v.* R. R., 12 Blatch. 452; Union Improvement Co. *v.* Com., 69 Penn. St. 140; St. Joseph *v.* R. R., 39 Mo. 476.

[1] Guaranty Co. *v.* Board of Liquidation, 105 U. S. 622.

[2] Penniman, *in re*, 103 U. S. 714; Beers *v.* Haughton, 9 Pet. 329; see Memphis *v.* U. S., 97 U. S. 293; Union Canal Co. *v.* Gilfillin, 93 Penn. St. 95; Supervisors *v.* Dennis, 96 Penn. St. 400; Ware *v.* Miller, 9 S. C. 13.

[3] Templeton *v.* Horne, 82 Ill. 491; McLellan *v.* Weston, 59 Ga. 883.

[4] Morse *v.* Goold, 1 Kern. 281; Bull *v.* Conroe, 13 Wis. 233; see Salt Co. *v.* East Saginaw, 13 Wall. 373, and cases of exemption disapproved, *supra*, § 493.

[5] Parrott *v.* Kumpf, 102 Ill. 423.

[6] *Infra*, § 567; Railroad *v.* Hecht, 95 U. S. 168.

[7] Bell *v.* Morrison, 1 Pet. 351; Atkinson *v.* Dunlap, 50 Me. 511; Rockport *v.* Walden, 54 N. H. 167; Reformed Church *v.* Schoolcraft, 65 N. Y. 134; State *v.* Jones, 21 Md. 432.

It is "within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made, or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect." Harlan, J., Koshkonong *v.* Burton, 104 U. S. 675.

That a statute of limitations, when extinguishing an action, is unconstitutional, while it is not unconstitutional when merely shortening the time in which suit is to be brought, see Bronson *v.* Kinzie, 1 How. 311 (Taney, C. J.); Bank of Alabama *v.* Dalton, 9 How. 522; McElmoyne *v.* Cohen, 13 Pet. 312; Call *v.* Hagger, 8 Mass. 423.

[8] Pelzer *v.* Campbell, 15 S. C. 581.

[9] Long's Appeal, 87 Penn. St. 114.

laws modifying the appraising of property on foreclosure of antecedent mortgages[1] and laws remodelling process by which antecedent debts can be recovered when an adequate remedy is reserved.[2]

[1] Jones v. Davis, 1 Neb. 11.

[2] Jackson v. Lamphire, 3 Pet. 280; Bronson v. Kinzie, 1 How. 311; Tennessee v. Sneed, 96 U. S. 69; Railroad v. Alabama, 101 U. S. 832; Memphis R. R. v. Tennessee, 101 U. S. 337; South Carolina v. Gaillard, 101 U. S. 433; Louisiana v. New Orleans, 102 U. S. 203; Hawthorne v. Calef, 2 Wall. 10; Long's Appeal, 77 Penn. St. 151; R. R. Co. v. Commissioners, 15 Gratt. St. 1; Richardson v. Alexander, 27 Ill. 136; Whitehead v. Latham, 81 N. C. 222; Watts v. Everett, 47 Iowa, 253, and other cases cited Whart. on Contr. § 1057.

Days of grace. It has been held in Connecticut, may be constitutionally abolished by statute, by the creation of a holiday. Barlow v. Gregory, 11 Conn. 261.

In Chicago Life Ins. Co. v. Auditor, 101 Ill. 82, it was held that the Illinois act of 1874, authorizing proceedings by the state auditor for the dissolution of life insurance companies for insolvency, etc., is not unconstitutional as applied to companies organized under special charters, either as impairing the obligation of the contract, or as a special law regulating the practice in courts of justice.

The Tennessee act of 1865, which provides (repealing a prior statute of 1855) that actions may be instituted against the state under the same rules that govern those between private citizens, giving, however, no power to the courts to execute those judgments, has been held by the supreme court of the United States (Swayne and Strong, JJ., dissenting) not to impair the obligation of the covenants entered into by the state; Memphis R. R. v. Tennessee, 101 U. S. 337.

In Ratcliffe v. Anderson, 31 Grat. 105, it was held that the Virginia act of 1877, section 3, which authorized the reopening of a judgment rendered since 1860, impaired the relations of the parties to the contract, and therefore was unconstitutional as impairing its obligation.

In Vance v. Vance, 108 U. S. 99, where a Louisiana statute provided that the property of a "tutor is tacitly mortgaged in favor of the minor as security for his administration;" a subsequent statute providing that after a future day, named reasonably distant, tacit mortgages should cease to exist as to third persons, unless revived by that date, was not held unconstitutional as to existing tutorships as impairing a contract. The last statute was held to be virtually a statute of limitations, and to be ruled by Curtis v. Whitney, 13 Wall. 68.

"The case," said Miller, J., "of Terry v. Anderson, 95 U. S. 628, presents, in the terse language of the chief justice of this court, both the rule, the reason for it, and the limitation which the constitutional provision implies. This court, he says, 'has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the enforcement of the action before the bar takes effect.'

"He adds in reference to the case then before the court, which was a South Carolina statute of limitation, passed since the civil war: 'The busi-

§ 493. When, however, the remedy on a contract is so modified as to put in the way of recovery obstacles seriously

ness interests of the entire people of the state had been overwhelmed by a calamity common to all, society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just inferences of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon, or an abandonment claimed. That, as we think, has been done here, and no more.' And Jackson *v.* Lamphire is again cited with approval.

"The same principle is asserted in the case of Koshkonong *v.* Burton, at the last term, 104 U. S. R. 668. Other cases in this court are Hawkins *v.* Barney's Lessee, 5 Pet. 457; Sohn *v.* Waterson, 17 Wall. 596; Sturges *v.* Crowninshield, 4 Wheat. 122."

In Gilfillin *v.* Union Canal Co., Sup. Ct. U. S., Nov. 1883, we have the following report in the Albany Law Journal for Jan. 5, 1884: "The legislature of Pennsylvania enacted a statute authorizing a settlement between a corporation and its creditors, and providing for an agreement for converting the entire debt into a funded indebtedness. The statute provided in express terms that the agreement, if entered into, should only be binding on such of the holders of bonds then existing 'as shall signify their assent in writing thereto; and in case any such bondholder shall fail to file with the president of such corporation his or her refusal in writing, to concur in the said agreement within three months from the date thereof, such bondholder shall be taken to have assented to the same.' Ample provision was made for notice to the bondholders to appear and express in writing their assents or dissents, and for the reservation of all the original rights of such as dissented. *Held*, that the statute which made the failure of a bondholder to signify his refusal to concur in the agreement of settlement within the specified time equivalent to an express assent in writing, did not impair the obligation of the bond. Corporate mortgages securing bonds are of a peculiar character, and each bondholder under them enters by fair implication into certain contract relations with his associates. Such bondholders are not like stockholders in a corporation, necessarily bound in the absence of fraud or undue influence, by the will of the majority, when expressed in the way provided by law, but they occupy to some extent an analogous position toward each other. The mortgage with the issue and distribution of bonds under it, creates a trust, of which the selected mortgagee, or his duly constituted successor, is the trustee, and the bondholders primarily and the stockholders ultimately the beneficiaries. It not unfrequently happens that compromises and adjustments of conflicting interests become necessary in the course of the administration of such trusts. As in the present case, a very large majority of the bondholders sometimes think it is for their own interest, as well as that of their associates, to surrender a part of their rights and accept others instead, and they prepare and submit for execution an agreement, the object of which is to carry their plan into effect. No majority, however large, can compel a minority, small though it be, to enter into such an agreement

impeding such recovery, this amounts to an impairing the obligation of the contract, and the legislation interposing such obstacles is nugatory.[1] It has consequently been held not to be within the power of a state legislature to stay execution on antecedent debts unless the property levied on should bring

But not when the obligation of the contract is thereby impaired.

against their will, and under the constitution of the United States, it is probable that no statute of a state, passed after the bonds were issued, subjecting the minority to the provisions of the agreement without their consent would be valid. But it seems to us a proper exercise of legislative power to require a minority to act whenever such an arrangement is proposed, and to provide that all shall be bound who do not in some direct way, within a reasonable time after notice, signify their refusal to concur. To sustain such legislation it is only necessary to invoke the principle enforced in statutes of limitations which make neglect to sue within a specified time conclusive evidence of the abandonment of a cause of action. As was said in Terry *v.* Anderson, 95 U. S. 634, where the limitation was of actions upon certain legal obligations that embarrassed the entire community at the close of the late civil war, 'the obligation of old contracts could not' in this way 'be impaired, but their prompt enforcement could be insisted upon or their abandonment claimed.' In Vance *v.* Vance, 108 U. S. 99, where it was held that an article in the constitution of Louisiana, adopted in 1868, which provided that existing secret mortgages and privileges should cease to have effect against third persons, after the 1st of January, 1870, unless before that time recorded, did not impair the obligation of a contract between an infant and her natural tutor, Miller, J., after stating that the strong current of modern legislation and judicial opinion was against the enforcement of secret liens on property, said: 'We think that the law in requiring the owner of this tacit mortgage for the protection of innocent persons dealing with the obligor, to do thus much to secure his own right and protect those in ignorance of those rights, did not impair the obligation of the contract, since it gave ample time and opportunity to do what was required and what was eminently just to everybody.' And in Jackson *v.* Lamphire, 3 Pet. 290, it was said: 'It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same, whether the deed is dated before or after the recording act.' Opinion by Waite, C. J." See Union Canal Co. *v.* Gilfillin, 93 Penn. St. 95, where the supreme court of Pennsylvania held that the statute was constitutional, reversing ruling reported in 7 Weekly Notes, 179.

[1] Bronson *v.* Kinzie, 1 How. 311; McCracken *v.* Hayward, 2 How. 608; Howard *v.* Bugbee, 24 How. 461; Furman *v.* Nichol, 8 Wall. 44; Green *v.* Barry, 15 Wall. 610; County of Moultrie *v.* Bank, 92 U. S. 631; University *v.* The People, 99 U. S. 309; Hall *v.* Wisconsin, 93 U. S. 637.

two-thirds of a valuation attached to it by appraisers;[1] and so of a state insolvent law undertaking to discharge antecedent debts due parties not citizens of the discharging state;[2] and laws so far exempting the debtor's property from execution on such debts as materially to impair their security;[3] and laws putting serious obstacles in the way of their recovery.[4]

[1] McCracken *v.* Hayward, 2 How. 608.

[2] Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Wheat. 213; and cases cited, *sup.*, § 440, *inf.*, § 495.

[3] Gunn *v.* Barry, 5 Wall. 610; Lewis *v.* Lewis, 47 Penn. St. 127; Baldwin *v.* Flagg, 43 N. J. L. 495; Wilson *v.* Brown, 58 Ala. 62; otherwise when exemption is exceptional, *supra*, § 492.

[4] U. S. *v.* Lincoln Co., 5 Dill. 184; Bunn *v.* Gorgas, 41 Penn. St. 441; Williams's App., 72 Penn. St. 214; and cases in Whart. on Cont., § 1067.

In Walker *v.* Whitehead, 16 Wall. 317, Swayne, J., said: "The laws which exist at the time and place of making the contract, and when it is to be performed, enter into and form a part of it. This embraces those which affect its validity, construction, discharge, and enforcement. . . . Any impairment of the obligation of a contract—the degree of the impairment is immaterial—is within the prohibition of the constitution." And in Murray *v.* Charleston, 96 U. S., Strong, J., said: "It is one of the highest duties of this court to take care that this prohibition shall neither be evaded nor frittered away. Complete effect must be given it in all its spirit."

In Bronson *v.* Kinzie, 1 How. 311, Taney, C. J., said: "If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in the courts in relation to past contracts as well as future. It may, for instance, shorten the period of time within which claims shall be barred by the statute of limitations. . . . And although the new remedy may be less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect be produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself."

As to unconstitutional stay laws, see Penrose *v.* Canal Co., 56 Penn. St. 46; Barnes *v.* Barnes, 8 Jones, N. C. 360; State *v.* Carew, 13 Rich. L. 498; Bumgardner *v.* Cir. Court, 4 Mo. 50.

That a state law is unconstitutional which legalizes the suspension of specie payments and extends the time of payment of such payments, see Godfrey *v.* Terry, 97 U. S. 171; though it was conceded that the state could relieve the bank from special penalties imposed on it by state legislation.

That a state law is unconstitutional which repeals a provision in a charter of a bank that its notes should be received for taxes, see Keith *v.* Clark, 97 U. S. 454.

It has, however, recently been held by the supreme court that a

§ 494. Nor is a state law, modifying the evidence to be received in a case, unconstitutional in respect to antecedent

statute of Louisiana requiring that a plaintiff having an execution judgment against the city should file a certified copy thereof in the controller's office, it being made the controller's duty to have the same registered, and to issue a warrant for the payment thereof, is not unconstitutional, this impairing no common law rights. Louisiana *v.* New Orleans, 102 U. S. 203; see Newark Savings Inst. *v.* Forman, 33 N. J. Eq. 436.

In Antoni *v.* Greenhow, 107 U. S. 769, it appeared that in 1871 the state of Virginia issued bonds which were declared by the state law to be, with the interest coupons attached, "receivable after maturity for all taxes, debts, dues, and demands due the state." It also appeared that at that time, in case of a refusal by a tax collector to receive the coupons or bonds for taxes, a writ of mandamus would lie from the supreme court of the state to compel him to receive them. Subsequently, and after these bonds had passed into the hands of holders for value, the legislature passed an act providing that, in case of a tender of coupons for taxes before proceedings could be taken in reference to their receipt for taxes, the taxpayer pay his tax in money, and send the coupons to a local court, before which the question of their genuineness was to be tried and determined; and, in case the judgment should be that the coupons were genuine, provision was made for refunding to the taxpayer the amount of such coupons. It was held by the supreme court of the United States that the change in the remedy for a refusal to accept the coupons for taxes was not unconstitutional as impairing the obligation of a contract. In November, 1872, the court of appeals in Virginia, in Antoni *v.* Wright, 22 Grat. 833, and subsequently in Clarke *v.* Tyler, 30 Grat. 134, held that these bonds were a valid contract with all persons taking the coupons to receive them in payment of taxes and state dues, and that the act in question, so far as it conflicted with the contract, was void. Waite, C. J., in giving the opinion of the supreme court of the United States, reversing the judgment of the Virginia court, said: "It cannot be denied that, as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form a part of the contract itself, and 'that this embraces alike those laws which affect its validity, construction, discharge, and enforcement' (Walker *v.* Whitehead, 16 Wall. 317), but it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left. This limitation upon the prohibitory clause of the constitution, in respect to the legislative power of the states over the obligation of contracts, was suggested by Chief Justice Marshall in Sturges *v.* Crowninshield, 4 Wheat. 122, and has been uniformly acted on since. Mason *v.* Haile, 12 Wheat. 378; Bronson *v.* Kinzie, 1 How. 311; Von Hoffman *v.* Quincy, 4 Wall. 535; Drehman *v.* Stifle, 8 id. 595; Gunn *v.* Barry, 15 id. 610; Walker *v.* Whitehead, 16 id. 314; Terry *v.* Anderson, 95 U. S. 628; Tennessee *v.* Sneed, 96 id. 69; Louisiana *v.* Pilsbury, 105 id. 278. As was very properly said by Mr. Justice Swayne in Von Hoffman *v.* Quincy, *ubi supra*, 'it is competent for

transactions.[1] This has been held to be the case with statutes removing the incapacity of witnesses,[2] with statutes giving

the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which under the form of modifying the remedy impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the constitution, and to that extent void.' In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge. Jackson *v.* Lamphire, 3 Pet. 280; Terry *v.* Anderson, *ubi supra*. We ought never to overrule the decision of the legislative department of the government unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. Munn *v.* Illinois, 94 U. S. 113. We have nothing to do with the motives of the legislature, if what they do is within the scope of their powers under the constitution."

Matthews, J., concurred with the judgment of the court on this ground: "I agree that the state of Virginia, by the act of 1871, entered into a valid contract with the holders of its bonds to receive their coupons in payment of taxes; and that any subsequent statute which denies this right is a breach of its contract and a violation of the constitution of the United States.

"But for a breach of its contract by a state, no remedy is provided by the constitution of the United States against the state itself; and a suit to compel the officers of a state to do the acts which constitute a performance of its contract by the state is a suit against the state itself.

"If the state furnishes a remedy by process against itself or its officers, that process may be pursued because it has consented to submit itself to that extent to the jurisdiction of the courts; but if it chooses to withdraw its consent by a repeal of all remedies, it is restored to the immunity from suit, which belongs to it as a political community, responsible in that particular to no superior."

Miller, Woods, and Blatchford, JJ., concurred with the chief justice. Bradley and Gray, JJ., concurred with the chief justice and with Matthews, J. Field and Harlan, JJ., dissented *in toto*, on the ground that the modification of the remedy impaired the obligation of the contract.

In Louisiana *v.* Jumel, 107 U. S. 711, it was held "that no state can be sued by a citizen without its consent, and a contract by a state cannot be enforced by coercing the agents and instrumen-

[1] *Supra*, § 474; Whart. on Ev., §§ 1238, 1239 *a*; Walker *v.* Whitehead, 16 Wall. 317; Danks *v.* Quackenbush, 1 Denio, 128; 3 Denio, 594; 1 N. Y., 129, and cases cited; Cooley's Const. Lim., 288.

[2] Rich *v.* Flanders, 39 N. H. 323; Smyth *v.* Balch, 40 N. H. 363; Walthall *v.* Walthall, 42 Ala. 450. See Whart. on Ev., § 463.

peculiar weight to presumptions;[1] or shifting the evidence of proof;[2] or modifying the rule excluding parol evidence to vary

talities of the state, whose authority has been withdrawn in violation of the contract, without having the state itself in its political capacity a party to the proceedings. The relief asked would require the officers against whom the process goes to act contrary to the positive orders of the same supreme political power of the state, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared it shall not be done. The officers owe duty to the state alone, and have no contract relations with the bondholders. They can only act as the state directs them to act, and hold as the state allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the state, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the state, but not the state through them." See *infra*, § 532, on the question of suability of states.

The two last cited rulings of the supreme court are criticized by Mr. Pomeroy in 17 Am. Law Rev. 684, and are, it is insisted, equivalent to an endorsement of state repudiation. *Cf.* reply in 17 Am. Law Rev., 939.

In Ewell *v.* Daggs, supreme court of the United States, 1883, it was held that when a statute of Texas declared usurious instruments void as to the amount of the interest, and a subsequent statute repealed all usury laws, this repeal took away the defence of usury from existing contracts, and was valid under the Federal constitution. "The repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defence for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights or impaired the obligation of contracts. The very point was so decided in the following cases: Curtis *v.* Leavitt, 15 N. Y. 9; Savings Bank *v.* Allen, 28 Conn. 97; Welch *v.* Wadsworth, 30 id. 149; Andrews *v.* Russell, 7 Blackf. 474; Wood *v.* Kennedy, 19 Ind. 68; Town of Danville *v.* Pace, 25 Grat. 1; Parmelee *v.* Lawrence, 48 Ill. 331; Woodruff *v.* Scruggs, 27 Ark. 26.

"And these decisions rest upon solid ground. Independent of the nature of forfeiture as a penalty, which is taken away by a repeal of the act, the more

[1] Whart. on Ev., § 1238.

[2] Whart. on Ev., §§ 353 *et seq.*; Callahan *v.* Hurley, 93 U. S. 387; Hand *v.* Ballou, 12 N. Y. 541. That legislation modifying the rules of evidence, provided it does not extinguish or create causes of action, is constitutional in respect to past transactions even in states whose constitutions prohibit retrospective legislation, see Fales *v.* Wadsworth, 23 Me. 533; Com. *v.* Williams, 6 Gray, 1; Karney *v.* Paisley, 13 Iowa, 89; Sutton *v.* Fox, 55 Wis. 531; Howard *v.* Moot, 64 N. Y. 262.

written engagements;[1] or making tax deeds *prima facie* evidence that all the prior procedure was regular;[2] or curing

general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no elements in the right that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read *v.* Plattsmouth, decided at the present term. And see Lewis *v.* McElvain, 16 Ohio, 347; Johnson *v.* Bentley, id. 97; Trustees *v.* McCaughey, 2 Ohio State, 155; Satterlee *v.* Mathewson, 16 S. & R. 169; 2 Pet., 380; Watson *v.* Mercer, 8 id. 88." Ibid. Matthews, J.

In Chaffraix *v.* Board of Liquidation, 11 Fed. Rep. 638, the facts were these: In 1874 the state passed a funding act authorizing the issue of "consolidated bonds" to a certain amount for the purpose of taking up the old outstanding obligations, at the rate of sixty cents on the dollar. The act provided for a state tax to meet the interest and principal of the new bonds, and created a board of liquidation to carry out the provisions of the act. Other stipulations were added, making the engagement of the state with its creditors a very explicit and deliberate one. In Board of Liquidation *v.* McComb, 92 U. S. 531, the supreme court affirmed a decree of the circuit court perpetually restraining the board from carrying out an act of the Louisiana Legislature authorizing the issue of a portion of the consolidated bonds to take up certain levee obligations of the state not included in the provisions of the funding act. After this the state, by its new constitution, directed that the funds which had accumulated under the act of 1874 should be devoted to other purposes.

Pardee, C. J., held that the decision of the supreme court in 1875 covered the case, and that the eleventh amendment did not apply, and granted the injunction. Billings, D. J., dissented on the ground that a state was virtually the defendant.

In Kring *v.* Missouri, 107 U. S. 221, Miller, J., gives the following illustrations of laws of process void as impairing the obligation of contracts:—

"1. Which give the debtor a longer stay of execution after judgment. Blair *v.* Williams, 4 Litt. (Ky.) 34; McKinney *v.* Carroll, 5 Mon. (Ky.) 96.

"2. Which require on a sale of his property under execution an appraisement, and a bid of two-thirds the value so ascertained. Bronson *v.* Kinzie, 1 How. 311; McCracken *v.* Hayward, 2 id. 608; Sprott *v.* Reid, 3 Greene (Iowa), 489.

"3. Which allow a period of redemp-

[1] Gibbs *v.* Gale, 7 Md. 76.

[2] Hand *v.* Ballou, 12 N Y. 541; Forbes *v.* Halsey, 26 N. Y. 53; Lumsden *v.* Cross, 10 Wisc. 282; Wright *v.* Dunham, 13 Mich. 414.

the defects in certain classes of records so as to make them admissible.[1] Statutes, also, making defective records admissible, have been held to be constitutional.[2] But, as we have seen, statutes making evidence conclusive, are unconstitutional, as being a violation of the constitutional rule requiring that property shall not be taken except in due course of law.[3] Nor, according to the weight of opinion, is a Federal statute, requiring that unstamped documents shall not be received in evidence, binding in state courts.[4] Statutes, also, modifying the rules of evidence, are not *ex post facto* in respect to prior transactions prosecuted as crimes unless they render that criminal which was not criminal before the passage of the statute.[5]

Statutes modifying evidence not unconstitutional.

§ 495. As has been already stated, a state insolvent discharge does not bar debts incurred prior to the statute authorizing it; nor as to subsequent debts, does it bind citizens of other states unless validating such procedure.[6] But where there is a contract between two citizens of the same state, one of whom subsequently removes to another state, the removal does not relieve

State discharges do not bind citizens of other states.

tion after sale. Lapsley *v.* Brashears, 4 Litt. (Ky.) 58; 7 T. B. Mon. (Ky.) 47; Cargill *v.* Power, 1 Mich. 369; Robinson *v.* Howe, 13 Wis. 341.

"4. Which exempt from sale under judgment for the debt a larger amount of the debtor's property than was exempt when the debt was contracted. Edwards *v.* Kearney, 96 (U. S.) 595, and the cases there cited; Story's Commentary on the Constitution, § 1385.

"There are numerous similar decisions showing that a change of the law which hindered or delayed the creditor in the collection of his debt, though it related to the remedy or mode of procedure by which that debt was to be collected, impaired the obligation of the contract within the meaning of the constitution."

See Durkee *v.* Board of Liquidation, 103 U. S. 646; Moore *v.* Holland, 16 S. C. 15; Horne *v.* Slate, 84 N. C. 362; McClain *v.* Easly, 4 Bax. 520; Vance *v.* Vance, 32 La. An. 186.

[1] *Infra*, § 567; Webb *v.* Den, 17 How. 576.

[2] Webb *v.* Den, 17 How. 576; *infra*, § 567.

[3] *Supra*, § 388; *infra*, § 565; East Kingston *v.* Towle, 48 N. H. 57; Call *v.* Hagger, 8 Mass. 423; Groesbeck *v.* Seeley, 13 Mich. 329; Little Rock R. R. *v.* Payne, 33 Ark. 816; and cases cited in Cooley's Const. Lim., 365–9.

[4] Cooley, Const. Lim., 483; Whart. on Ev., § 697, and cases there cited.

[5] *Supra*, § 474.

[6] *Supra* §§ 439–440, *et seq.*

the creditor removing from an insolvent discharge by the first state.[1]

[1] Stoddard *v.* Harington, 100 Mass. 87; see Baldwin *v.* Hale, 1 Wall. 223; Guernsey *v.* Wood, 130 Mass. 503; see Moore *v.* McMillan, 54 Vt. 27, and cases cited *supra*, § 446.

In Mather *v.* Nesbit, 13 Fed. Rep. 872, it was held that the provision of an insolvent law which does not grant a discharge of the debtor on surrender of all his property to an assignee or a receiver, but merely gives a priority to creditors who will release the debtor over those who stand back and do not accept the conditions under which his property passes to the assignee or the receiver, and who alone can receive dividends from the estate, is not in conflict with the constitution of the state or of the United States.

In Murphy *v.* Manning, 134 Mass. 488, it was held that in a suit on a Massachusetts judgment on a debt due to a citizen of New Jersey, an insolvent discharge under the Massachusetts statute, after the rendition of the judgment, was no defence. Holmes, J., said: "It is not denied that the original debt would not have been discharged. Ilsley *v.* Merriam, 7 Cush. 242; Kelley *v.* Drury, 9 Allen, 27; but the distinction is taken that as the plaintiffs have elected to merge the debt in a Massachusetts judgment, that judgment at all events must be subject to the state laws and is disposed of by the discharge. A very forcible argument may be made in favor of such a view, but we think there are stronger considerations on the other side, which is also supported by the weight of authority. Kelley *v.* Drury establishes that our insolvent laws do not shut out parties whose claims are not subject to or discharged by them from access to our state courts. We may say more broadly that the legislature has not shown an intention to adopt a local rule as to the procedure within its control, except so far as it has power to dispose of the substantive rights in aid of which the procedure is set in motion. We are speaking, of course, of the statute affecting the present decision. It follows that unless the original debt is merged in the judgment in such a sense that the debt and not merely this form of it has become subject to Massachusetts law, we must attribute the same validity to the judgment that remains to the debt. We think that the debt is not affected in this respect by the judgment. A judgment does not obliterate the essential features of the obligation on which it is rendered. Betts *v.* Bagley, 12 Pick. 572, 580: Choteau *v.* Richardson, 12 Allen, 365; Carpenter *v.* King, 9 Met. 511, 516. Conversely here, the plaintiff's claim before judgment, not being subject to discharge by our laws, did not lose that characteristic and become more infirm by the change, upon any ground of the substantive law. We think that the weight of authority is in favor of our conclusion, notwithstanding the dicta in Ogden *v.* Saunders, 12 Wheat. 213, 363, 364, and Towne *v.* Smith, 1 Woodb. & M. 115, 123; see Watson *v.* Bourne, 10 Mass. 337; Whitney *v.* Whiting, 35 N. H. 457; Poe *v.* Duck, 5 Md. 1; Brown *v.* Bridge, 106 Mass. 563."

In Conway *v.* Seamons, 55 Vt., it was held that a discharge under a state insolvent law does not bar a debt contracted before its passage, the creditor in no way becoming a party to the proceedings in insolvency; and that such debt is not discharged though

Marriage not within the constitutional limitation.

§ 496. Marriage is not a contract in the sense of the limitation before us, and hence divorces may be granted by states having jurisdiction irrespective of the place where the marriage was solemnized.[1]

Nor is tenure of public office.

§ 497. Nor do engagements, made by state or municipality with public officers, constitute a contract within the purview of this limitation. The salaries of such officers may be reduced or their terms of office closed by action of legislature, or of municipal board, or of constitutional convention.[2] On the other hand, a contract between a state and a private party, whereby he is to perform certain duties for a specific period, at a stipulated compensation, is so far within the protection of the limitation, that he cannot be deprived of such compensation by the repeal of the statute under which the contract was made.[3]

State constitution is under the same limitation as is act of legislature.

§ 498. A clause in a state constitution, impairing a prior contract, stands in the same position in this respect as an act of the legislature, and must equally yield to the superior force of the clause in the constitution of the United States.[4]

merged in a judgment rendered after the passage of the act, and which judgment is the basis of the suit before the court.

[1] Whart. Con. of Laws, §§ 223 *et seq.*; see Roth v. Ehman, 107 U. S. 319.

[2] Butler v. Pennsylvania, 10 How. 402; Warner v. People, 2 Denio, 272; Conner v. New York, 1 Selden, 285; Com. v. Bacon, 6 S. & R. 522; Com. v. Mann, 5 W. & S. 403; McBlair v. Bond, 41 Md. 137; Swann v. Buck, 40 Miss. 268.

[3] Hall v. Wisconsin, 103 U. S. 5; *supra*, §§ 477 *et seq.*

[4] Cummings v. Missouri, 4 Wall. 277; Keith v. Clark, 97 U. S. 454; Lehigh Valley R. R. v. McFarlan, 31 N. J. Eq. 706; Hays v. Com., 82 Penn. St. 517. And so of city ordinances, Hestonville R. R. v. Philadelphia, 89 Penn. St. 210. In Keith v. Clark, 97 U. S. 454, a constitutional amendment adopted in Tennessee, in 1866, providing that notes of the Bank of Tennessee, issued during the insurrectionary period, should be null and void, and should not be received for taxes, was held to conflict with the charter of the bank, which prescribed that its notes should be received for taxes, and hence that the constitutional amendment was invalid.

XIX. Powers of Executive.

President commands army, navy, and militia.

§ 502. The president, when acting as commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into service,[1] is as much governed by law as he is when executing his civil functions, though the law which governs his actions as commander-in-chief is the law of war. When war ceases his extraordinary powers as commander-in-chief cease with it.[2] It is not usual for him to exercise personally his military function, though this was done by General Washington during the whiskey insurrection. The ordinary course is for the president to act through the secretary of war. But his action as commander-in-chief is limited to the seat of war or to military matters connected therewith.

President has no power as commander-in-chief to dispense with law as a system.

§ 503. As is elsewhere seen, it is not within the power of congress to establish, even in times of war, military courts for the trial of civilians for civil offences. There is no provision in the constitution which authorizes the establishment of such a system in war or in peace. While war is raging commanding officers can no doubt hold courts-martial to try offenders against belligerent rights. When a hostile territory is occupied, the president, as commander-in-chief, may put it under military law until the civil courts can resume action.[3] But unless at such temporary catastrophes, it is not within the power of the president, as commander-in-chief, to appoint courts for either the trial of civilians for offences against the state, or for the determination of litigated civil issues.[4] The only case in which the president, as commander-in-chief, can order the trial of a civilian by court-martial, is where a civilian is arrested as a spy, and even in this case the party charged is arrested as a belligerent.[5] Nor do proclamations or orders of the president, as commander-in-chief, operate on the civil relations of the country.[6]

[1] Const., art. II., § 2.

[2] Milligan v. Hovey, 3 Biss. 13; *supra*, §§ 454 *et seq.*

[3] *Supra*, § 212.

[4] See *supra*, §§ 57, 58, 487 *et seq.*; Milligan, *ex parte*, 4 Wall. 2.

[5] Pomeroy, Const. Law, § 714.

[6] *Infra*, §§ 584, 589, 593.

§ 504. The term "cabinet" is as unknown in our own formal legislation as it is in that of England.[1] In England the cabinet consists of such high public officers, being privy councillors, as the prime minister may designate for the purpose; the prime minister being virtually the nominee of the house of commons. Our own constitution was framed before the British idea of a "cabinet" took the definite shape which it now assumes; and it is therefore not strange that while it is provided that the president "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices," this should be the only reference to an institution which has exercised often a controlling influence on the political destiny of the land.[2] Fortunately the framers of the constitution did not undertake to determine how many "departments" there should be; and at first the heads of these departments were the secretary of state, the secretary of the treasury, the secretary of war, and the attorney-general. It was not till many years elapsed that the post-office and the navy were added; nor until after another long delay that we had a department of the interior. But although not specifically established in the constitution, the "cabinet," immediately after the formation of the new government, came into active existence as a political necessity. So far from the president's official appeals to the heads of departments being limited to requiring the "opinions in writing" "upon any subject relating to the duties of their respective offices," it was the practice of President Washington, on all matters of difficulty, to call together in council the heads of departments, and to submit to their consideration all important questions requiring executive action. When we remember Washington's comparative inexperience with the details of politics, and the peculiar political eminence of Jefferson, secretary of state, and of Hamilton, secretary of the treasury, it is not to be wondered that Washington, desiring at the outset all the aid he could obtain in coming to politi-

Cabinet composed of heads of departments.

[1] See *supra*, § 18; Dean's British Constitution, 88.

[2] See *supra*, § 19.

cal conclusions, as to which he was always cautious, should have made the heads of departments a council by whose opinions, if they agreed, he generally considered himself bound. This has been often the case with his successors.—The heads of departments, on the other hand, no matter how independent they may sometimes have been, have officially acted only as the president's representatives, unless when in some peculiar cases a special duty is imposed by congress on a head of a department by name.[1]

President with advice and consent of senate may make treaties.

§ 505. The president, with the advice and consent of two-thirds of the senate, may make treaties, and such treaties form part of the supreme law of the land.[2] The term treaty is to be understood in its ordinary sense, and implies the cession or annexation of territory when part of an international arrangement;[3] the payment or reception of a sum of money in discharge of a claim;[4] and the modification of prior acts of congress bearing on the same subject matter.[5]

Treaties in some respects self-enforcing; but not in respect to matters requiring legislative action.

§ 506. A treaty, so far as it transfers rights to territory, or adjusts disputed claims, becomes the supreme law of the land from the time of its ratification, overriding prior legislation, whether state or Federal.[6] But both in this country and in England, money, when required by treaty to be paid, cannot be disbursed without legislative authority. It may be the duty, for instance, of the house of representatives to concur in making such an appropriation; but, as was the case with Jay's treaty in Washington's administration, there may be constitutional objections raised which may put serious obstacles in the way of a concurrence. As

[1] Parker *v.* U. S., 1 Pet. 293; Wilcox *v.* Jackson, 13 Pet. 498; Marbury *v.* Madison, 1 Cranch, 137.

[2] Const., art II., § 2, cl. 2. As to treaties, see more fully, *supra*, §§ 155, 383 *et seq.*

[3] Amer. Fire Ins. Co. *v.* Canter, 1 Pet. 253.

[4] Ibid.

[5] See Garcia *v.* Lee, 12 Pet. 511.

[6] See *supra*, § 383; Hauenstein *v.* Lynham, 100 U. S. 483, where it was held that treaties executed by the Federal government with foreign states, giving citizens of such states power to hold lands, override state legislation to the contrary; see *supra*, § 383, as to conflict between treaties and laws.

yet, however, there has been no case in which the appropriation required to carry out a ratified treaty has been refused; though the right of the house of representatives to refuse assent when its assent is required cannot well be questioned.[1] What has been said in respect to appropriations applies to all other stipulations in a treaty which require legislative action for their enforcement. Treaties, however, may be self-executing, in which case they require no legislation to put them into operation.[2]

President has power to reprieve and pardon.

§ 507. The president, by the last clause of the second section of the second article, has "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." The term "pardon" is to be taken, being an act of mercy, in its most general sense, and may be thus classified.

1st. *Pardon before conviction.* Such a pardon may be granted under the clause before us, and precludes further prosecution for the offence.[3]

2d. *Pardon after conviction.* The effect of this pardon is to cancel the conviction, to remove the infamy and other penalties imposed by it, and to rehabilitate the person pardoned in his former state.[4]

3d. *Amnesty*, which though technically distinguishable from pardon in the fact that it is addressed to a class and not to an individual, is to be grouped under the term "pardon" in the clause before us. Amnesties, being acts of peace and oblivion, are to be construed with peculiar liberality.[5] Amnesty acts, however, growing out of the late civil war, cannot be extended to cover offences not distinctively connected with that war.[6] An amnesty takes effect as a pardon from the time of its proclamation.[7]

[1] Turner *v.* Baptist Union, 5 McLean, 344; Taylor *v.* Morton, 2 Curt. 454; Metzger, *in re*, 1 Barb. 248.

[2] Opinions of Justices, 68 Me. 589; *supra*, §§ 157 *et seq.*

[3] Garland, *ex parte*, 4 Wall. 333; Armstrong *v.* U. S., 13 Wall. 154; Pargoud's Case, 13 Wall. 156; and other cases cited Whar. Cr. Pl. & Pr. § 523.

[4] See Whart. Cr. Pl. & Pr. § 524.

[5] U. S. *v.* Greathouse, 2 Abb. U. S. 364.

[6] State *v.* Haney, 67 N. C. 467; Whart. Cr. Pl. & Pr. 525.

[7] Lapeyre *v.* U. S., 17 Wall. 191.

§ 508. Impeachments are taken out of the range of the pardoning power of the president; and this is eminently proper, as impeachments are only for political offences, and the penalties inflicted are only political. In England contempts are excepted; but in this country pardons have been held to apply to commitments for contempt.[1]

Impeachments excepted, and by some authorities contempts.

§ 509. It is settled, under the clause before us, that a condition may be attached to a pardon, and that, on its non-performance, the pardon does not take final effect, and the original sentence revives.[2] An illegal condition is inoperative;[3] but this is not the case with a condition that the party pardoned will not, by virtue of the pardon, claim confiscated property.[4]

Pardons may be conditional.

§ 510. As a general rule, pardon before sentence remits costs and penalties; though it is otherwise, when the pardon comes after sentence, as to costs and penalties due parties other than the state. A pardon, also, when issued after the commencement of proceedings in which the informer's action is *in rem*, does not divest the informer's interest.[5] Under the confiscation act, enacted during the civil war, a pardon relieves from forfeiture of whatever property would have accrued to the United States.[6]

Pardon before sentence remits costs and penalties.

§ 511. The president, by the third clause of the second section of the second article of the constitution, "by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers, and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not

President has power of appointment and removal.

[1] Mullee, *in re*, 7 Blatch. 23; Hickey, *ex parte*, 4 Sm. & M. 751.

[2] U. S. *v.* Wilson, 7 Pet. 150; Wells, *ex parte*, 18 How. 307; Osborn *v.* U. S., 91 U. S. 474, and other cases cited Wh. Cr. Pl. & Pr. § 533; and see Haym *v.* U. S., 7 N. & H. 443.

[3] Wh. Cr. Pl. & Pr. § 533.

[4] Osborn *v.* U. S., 91 U. S. 474. That the power to pardon does not involve power to substitute an entirely different punishment without the party's assent, see Wells, *ex parte*, 13 How. 307.

[5] See cases cited in full in Whart. Cr. Pl. & Pr., § 528.

[6] Armstrong's Foundry, 6 Wall. 766; U. S. *v.* Padelford, 9 Wall. 531.

That congress cannot modify the effects of a pardon, see *supra*, §§ 388 *et seq.*

herein provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments. The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session." It was no doubt intended, when this article was framed, that the president should consult with the senate as to appointments to be made "with their advice and consent;" and President Washington, at the beginning of his administration, appears to have endeavored to give this view effect. This, however, was soon discovered to be impracticable. The senate, for a large part of the year, is not in session; and even when in session, it cannot, without great embarrassment to the executive as well as to itself, undertake to participate in the selection of public officers. The settled construction of the constitution now is, that the "advice" of the senate is not to be given until the nomination is sent in.—Whether *removal* from office requires the consent of the senate, was for a long time an open question.[1] By the act of March 2, 1867, however, such consent was made essential to a removal; and the constitutionality of this act has not been contested.—A confirmation, however, of the appointment of a successor, is a consent by the senate to the removal of his predecessor.[2]

[1] See *supra*, § 19.

[2] As to inferior officers, under the above clause, see U. S. *v.* Moore, 95 U. S. 760; U. S. *v.* Germaine, 99 U. S. 508.

The president may remove an officer of the army or navy by the appointment, with the consent of the senate, of his successor. Blake *v.* U. S., 103 U. S. 227.

The act of 1867, above noticed, in respect to removals from office contains the following provisions: (1) No removal made by the president shall be valid unless consented to by the senate. (2) In case the president feels called upon to close the services of an officer during recess of the senate, this is effected by a suspension of such officer, which continues until the close of the next succeeding session of the senate. (3) The president, during the recess of the senate, can only fill such vacancies as happen by death or resignation.

On the subject of President Johnson's removal of Mr. Stanton as secretary of war, see Townsend's Anecdotes of the Civil War, p. 124.

§ 512. Not only is it a part of the duty of the president to communicate his views to congress as to matters to come before them for legislative action, but, as we have seen,[1] he has the right to arrest by his veto the enactment of a statute; and unless the bill receive, after such a veto, a majority of two-thirds of the members voting in each house (there being a quorum present), the bill fails to become a law. If, however, the bill be not returned by the president within ten days, Sundays excepted, after it has been presented to him, it becomes a law in like manner as if he had signed it; unless congress, by adjournment, prevent its return. The effect of this provision as a check on inconsiderate legislation, has been already considered.[2]

Has qualified legislative functions.

§ 513. As has been already seen, the president cannot be restrained from or coerced to executive action by writs issuing from the judiciary; and on this ground the supreme court has held that writs of mandamus[3] and injunction,[4] addressed to the president, must be refused. The president's discretion, in the execution of the laws, in other words, cannot be overruled by judicial action. The mode of correcting errors made by him in this respect is political, not judicial; the only way of punishing him for official misconduct is by impeachment.[5] The heads of departments, when acting as the president's political or confidential agents, are subject to the same immunities. It is otherwise, however, when specific duties are assigned to them by statute. In the latter case, they are subject to writs of mandamus or injunction.[6]

President cannot be controlled by judicial writ.

[1] *Supra*, § 398.

[2] *Supra*, § 362. As to time of passing bill, see *infra*, §§ 642–3.

[3] *Supra*, § 391; Marbury *v.* Madison, 1 Cranch, 137; Gaines *v.* Thompson, 7 Wall. 347; Secretary *v.* McGarrahan, 9 Wall. 298.

[4] Mississippi *v.* Johnson, 4 Wall. 475; Georgia *v.* Stanton, 6 Wall. 57.

[5] *Supra*, § 399.

[6] Marbury *v.* Madison, 1 Cranch, 137. That an injunction cannot be granted to restrain the president from its execution if alleged to be unconstitutional, see Mississippi *v.* Johnson, 4 Wall. 475.

In Mississippi *v.* Johnson, *ut sup.*, the court said: "The congress is the legislative department of the government, and the president the executive. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cogni-

XX. Power of Judiciary.

§ 516. By the first section of article three it is provided that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." The second section prescribes that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens, or subjects." It will be seen that this jurisdiction falls under two heads: *first*, that of which the subject-matter is the test (*e. g.*, the construction of Federal constitution and laws), as to the law of which the Federal judiciary is supreme; and, *secondly*, that of which the parties are the test (*e. g.*, ambassadors and states), as to which the law it lays down does not necessarily rule, except as to the exact issue.

Judicial power of the United States extends to cases under U. S. constitution, laws, and treaties; to cases of admiralty and maritime jurisdiction and cases in which the United States or states are parties.

§ 517. The supreme court of the United States has original jurisdiction "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party." All other Federal judicial powers may be apportioned by congress among such courts as may be regarded by it as best fitted for the kind of jurisdiction to be exercised and the

Judicial powers are in the main to be apportioned by congress.

zance." See *infra*, § 593. That the judiciary cannot determine matters purely political, see further, *supra*, §§ 389–390.

amount of business to be performed. And the statutes by which such inferior courts are established may be constitutionally repealed.

Supreme court has no general original jurisdiction.

§ 518. The specific grant of original jurisdiction to the supreme court of the United States in cases concerning ambassadors, and cases in which states are parties, has been held to preclude it from taking original, as distinguished from appellate jurisdiction, in all other cases.[1] Thus it has been held that the court has no original jurisdiction to grant a writ of *habeas corpus*;[2] or a writ of *certiorari* to a district judge in an extradition case;[3] or a writ of a mandamus to the head of an executive department.[4]

Supreme court has final jurisdiction in all conflicts with state courts as to Federal constitution, treaties, and laws.

§ 519. On all questions involving collisions between the supreme court of the United States and the state courts with regard to the relations of the states to the general government, the decision of the supreme court of the United States is final so far as concerns the specific suit.[5] This is plainly prescribed by the constitution, and were it not so, the country would be plunged into disastrous confusion. It does not follow from this that all suits involving questions between the Federal and the state systems must be originally brought in the Federal courts. If it were necessary that such should be the case, the great mass of litigation would be absorbed in the Federal courts, and state jurisdiction would be almost totally extinguished. This difficulty has been avoided by retaining the rule limiting the jurisdiction of the Federal courts in the mode above stated, but permitting, as will be seen,[6] suits to be transferred to the Federal courts whenever the case depends on the construction of the constitution, or on the validity of any legislation, Federal or state, or of any action of any Federal officer, or on the effect of any treaty negotiated by the general government, supposing that in such cases the decision of the state court is against the

[1] Vallandigham, *ex parte*, 1 Wall. 243.

[2] See *Ex parte* Yerger, 8 Wall. 85.

[3] Metzger, *in re*, 5 How. 176.

[4] Marbury *v.* Madison, 1 Cranch, 137.

[5] See *supra*, §§ 376 *et seq.*; *infra*, § 526.

[6] See *infra*, § 521.

Federal government. And to secure this right of supervision it is provided that "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined, and reversed or affirmed in the supreme court on a writ of error."[1] Under this statute there can be no review by the supreme court of the United States when the decision of the state court is in favor of the constitution of the United States. There must be a decision against the United States to sustain the removal.[2] But a decision sustaining an act may be the subject of revision when it is alleged that that act (*e. g.*, in the legal tender cases) was in conflict with the Federal constitution.[3]

"Citizen" in the clause giving Federal

§ 520. The term "citizen," in the clause giving the Federal courts jurisdiction in suits between "citizens of different states," as well as in the following clauses, is to be understood in the sense of "resi-

[1] Act of Sept. 24, 1789.

[2] Gordon *v.* Caldcleugh, 3 Cranch, 268; Ryan *v.* Thomas, 4 Wall. 603; Messenger *v.* Mason, 10 Wall. 507; Bolling *v.* Lersner, 91 U. S. 594.

[3] Trebilcock *v.* Wilson, 12 Wall. 687. The conflicting judgment must be that of a *state* court. A judgment by a territorial court cannot be revised on this ground. Miners' Bank *v.* Iowa, 12 How. 1. The record, however, need not point out explicitly the act of congress or the clause in the constitution supposed to be invaded. Furman *v.* Nichol, 8 Wall. 44. But it must appear that there was such an invasion of Federal rights. Knox *v.* Bank, 12 Wall. 379. If the alleged error did not operate to determine the conclusion of the state court, there is no ground for reversal. Williams *v.* Oliver, 12 How. 111.

dents."[1] A corporation in this sense represents corporators who are residents in the state by which the charter is granted.[2]

courts jurisdiction, means "resident."

[1] Shelton *v.* Tiffin, 6 How. 163.

[2] Bank of U. S. *v.* Planters' Bank, 7 Wheat. 904; Ins. Co. *v.* Francis, 11 Wall. 210. In Grace *v.* Ins. Co., Sup. Ct. U. S., 1883, an opinion was given by Harlan, J., from which the following is extracted:—

"The record in this case presents a question of jurisdiction which, although not raised by either party in the court below, or in this court, we do not feel at liberty to pass without notice; Sullivan *v.* Steamboat Co., 6 Wheat. 450. As the jurisdiction of the circuit court is limited in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, the presumption is that a cause is without its jurisdiction, unless the contrary affirmatively appears; Turner *v.* Bank of North America, 4 Dall. 8; *Ex parte* Smith, 94 U. S. 455; Robertson *v.* Cease, 97 ib. 646. In the last case it is said that 'where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record;' Railway Co. *v.* Ramsey, 22 Wall. 322; Briges *v.* Sperry, 95 U. S. 401. In Brown *v.* Keene (8 Pet. 112) it is declared not to be sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings; that the averments should be positive. The present case was commenced in the supreme court of New York, and was thence removed, on the petition of the defendant, to the circuit court of the United States for the eastern district of New York. The record does not satisfactorily show the citizenship of the parties. The complaint filed in the state court shows that the firm of Wm. R. Grace & Co., composed of Wm. R. Grace, Michael P. Grace, and Charles R. Flint, is doing business in New York, and that Wm. R. Grace and Charles R. Flint are residents of that state. The petition for the removal of the cause shows that the defendant is a corporation of the state of Missouri; that Wm. R. Grace and Charles R. Flint reside in New York; and that Michael P. Grace is a resident of some state or country unknown to defendant, but other than the state of Missouri. The record, however, fails to show of what state the plaintiffs are citizens. They may be doing business in and have a residence in New York without necessarily being citizens of that state. They are not shown to be citizens of some state other than Missouri; Bingham *v.* Cabbot, 3 Dall. 382; Abercrombie *v.* Dupuis, 1 Cranch, 343; Jackson *v.* Twentyman, 2 Pet. 136; Sullivan *v.* Fulton Steamboat Co., *supra;* Hornthal *v.* Collector, 9 Wall. 560; Brown *v.* Keene, *supra;* Robertson *v.* Cease, *supra.* It is true that the petition for removal, after stating the residence of the plaintiffs, alleges 'that there is, and was at the time when this action was brought, a controversy therein between citizens of different states.' But that is to be deemed the unauthorized conclusion of law which the petitioner draws from the facts previously averred. Then there is the bond given by the defendant on the removal of the cause, which recites the names of the firm of Wm. R. Grace & Co., and describes it as 'of the county of Kings and state of New York.' If that bond may be con-

§ 521. By act of congress suits may be removed from state to Federal courts in the following cases:—

By statute cases may be removed from state to Federal courts.

(1) Where the suit is against an alien or a citizen of another state, when it may be removed on petition of the defendant; and such removal may be had where there is a single defendant who is an alien or a citizen of another state.[1]

(2) A citizen of another state, when either plaintiff or defendant in a suit in a state court, may have the case removed to the Federal courts on filing an affidavit that he has reason to believe that from prejudice or local influence he cannot obtain justice in the state court.

(3) A corporation (other than a banking corporation organized under a law of the United States) or any member thereof, may, when defendant in a state court, obtain a removal on an affidavit that the defendant has a defence under the constitution, laws, or treaties of the United States.

(4) A defendant who cannot enforce in the state court any "civil right" granted to him by the constitution of the United States, or who is an officer of the United States sued for official action as such, may obtain a like removal.[2] And this right is extended to all suits or criminal prosecutions brought in state courts against revenue officers, or persons holding property obtained from such officers under revenue laws; or against any persons whomsoever on account of any act done under the laws of congress respecting the elective franchise. And it has been held by the supreme court of the United States that under this section criminal prosecutions for alleged offences against state

sidered as part of the record for the purpose of ascertaining the citizenship of the parties, the averment that the plaintiffs are 'of the county of Kings and state of New York,' is insufficient to show citizenship; Bingham v. Cabot, 3 Dall. 382; Wood v. Wagnon, 2 Cranch, 9."

Whether the Federal courts have jurisdiction in controversies between domiciled citizens of different states in the matter of the custody of children has been disputed. This jurisdiction was affirmed by Deady, J., in Bennett v. Bennett (Deady, 299), but denied, and with the better reason, by Leavitt, J. (Everts, *ex parte*, 1 Bond, 197), and Betts, J. (Barry v. Mercein, 5 How. 103), where Judge Betts's decision was affirmed on the ground of want of jurisdiction.

[1] See Rev. Stat. U. S., §§ 639 *et seq.*

[2] See Texas v. Gaines, 2 Woods, 342.

laws may be removed to the Federal courts when the cases involve any of the conditions above stated.[1]

(5) The privilege of removal, also, is given in cases where a personal suit is brought in a state court by an alien against a civil officer of the United States, who is a non-resident of the state in which he is personally served with process.[2]

The Federal court to which the application for removal is made is the exclusive judge of the adequacy of the grounds set forth for removal, which grounds, however, must appear on record with such sufficiency as to satisfy the conditions prescribed by the statute.[3] The right is not affected by a state statute providing that suits of the class in question can only be brought in its own courts;[4] nor by a condition imposed on foreign corporations that before doing business in a state, they must waive the right to remove suits to the Federal courts.[5]

[1] Strauder *v.* West Virginia, 100 U. S. 303; Neal *v.* Delaware, 103 U. S. 370; and other cases cited *infra*, § 586.

[2] See Rev. Stat. U. S., § 644.

[3] Insurance Co. *v.* Pechner, 95 U. S. 183; Goldwashing Co. *v.* Keyes, 96 U. S. 199.

[4] Railway Co. *v.* Whitton, 13 Wall. 270.

[5] Insurance Co. *v.* Morse, 20 Wall. 445. In New Jersey Line Co. *v.* Trotter, U. S. Cir. Ct. New Jersey, 1883, we have the following from Nixon, J.: "The second clause, § 2 of the Removal Act of 1875, enacts that when in any suit pending in a state court there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district. This provision is predicated upon the fact that actions are often in their nature severable and frequently embrace more than one controversy. The object was to enable citizens of different states, who found themselves involved in a suit in which more than one controversy existed, and one of which was capable of being fully determined without the presence of other parties named in the action, to avail themselves of their constitutional right to have their separate controversy settled in a Federal court. But the bill in the present case seems to reveal only one cause of action, to wit, the reformation of certain deeds. The several defendants are made parties because they are directly interested in this single controversy; the Franklinite Steel Zinc Company, because it claims an equitable title to the premises in dispute; Curtis, because he holds the legal title as trustee; and Trotter, because he has an immediate interest in defeating the attempt to reform the deeds, which, if successful, would deprive him of the right as lessee of Curtis to enter upon the disputed premises to mine for franklinite. Any court would require the presence of all these parties before it would proceed to a final decree. 1 Daniell on Ch. Pr. (5th Am. ed.) 190, n. 5; Story on Eq., Pl., § 72; Shields *v.*

Political questions not of judicial cognizance.

§ 522. We have already seen that it has been repeatedly decided by the supreme court of the United States, that in matters purely political and within the congressional or executive sphere, that court will follow the lead of congress or of the executive as the case may be.[1] In matters of this class it is the duty of the court, as has been shown, to follow the lead of the executive or the legislative branch of the government, whichever may be charged with the particular function;[2] and for the judiciary to determine questions belonging properly to the legislature is as much an invasion of the constitution as it is for the legislature to determine questions belonging properly to the judiciary.[3]

Admiralty and maritime jurisdiction to be distinguished.

§ 523. The constitution gives the Federal courts jurisdiction, as we have seen, in "all cases of admiralty and maritime jurisdiction;" and "admiralty" and "maritime" are, in one sense, terms widely distinguishable. Admiralty jurisdiction covers whatever concerns business on navigable waters.[4] Maritime jurisdiction covers all business on the high seas. There are many cases of admiralty law (*e. g.*, proceedings in prize courts, and proceedings *in rem*) which could not be instituted in common law courts. There are many cases of maritime jurisdiction, *e. g.*, suits for collision, which are as cognizable in common law courts, though in a different form of action, as in admiralty.[5] Much fluctuation of opinion existed for some time

Barrow, 17 How. 130; Ribon *v.* R. R., 16 Wall. 446; Abbot *v.* Rubber Co., 4 Blatchf. 489. Calvert on Parties to Suits in Eq., 285, states that a bill cannot be filed against a lessee for the purpose of disputing the title of the lessor or owner of the inheritance without making him a party. In Hyde *v.* Ruble, 104 U. S. 407, the court, in considering the clause on which the present removal is demanded, says: 'To enable a party to remove under this clause there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different states from those on the other.' Holding this view of the nature and character of the action and being bound by the construction of the Removal Act in Barney *v.* Latham, 103 U. S. 205, and Hyde *v.* Ruble, *supra*, I must remand the cause."

[1] *Supra*, § 389.

[2] *Supra*, §§ 388 *et seq.*

[3] *Supra*, § 391.

[4] See *supra*, § 36.

[5] Story on Const., § 1666; Cooley's Int. Const. Law, 114; see The General Smith, 4 Wheat. 438; The Moses Taylor, 4 Wall. 411; The Maggie Ham-

as to the extent of admiralty jurisdiction in the United States, which was once supposed to be limited to tide-water; but it is now held by the supreme court of the United States that that jurisdiction extends to all navigable waters, though confined in a single state,[1] as well as to the great lakes and their navigable tributaries.[2] Even collisions on a canal connecting great navigable thoroughfares are within admiralty jurisdiction.[3] But the fact that there is admiralty jurisdiction over territorial waters does not destroy state jurisdiction over such waters.[4] "The admiralty jurisdiction of the Federal courts has, within the last few years, by constructions placed upon it by the Federal courts, received an immense increase in its extent. Twenty years ago it was held that jurisdiction in admiralty was limited, in fact, to the sea-board, if not actually to the sea; it extended no further on the rivers than the tide ebbed and flowed in those rivers. It has been held since that time, by the supreme court of the United States, that the admiralty jurisdiction extended to all the navigable streams; that

mond, 9 Wall. 435; Leon *v.* Galceran, 11 Wall. 185; The Lottawanna, 21 Wall. 558.

[1] Jackson *v.* The Magnolia, 20 How. 296; The Hine *v.* Trevor, 4 Wall. 555; The Genesee Chief, 12 How. 443. The question of navigability depends upon that of customary trade and travel; The Daniel Ball, 10 Wall. 557.

[2] The Eagle, 8 Wall. 15.

[3] Cooley's Int. Const. Law, 115, citing Scott *v.* Young America, Newb. Adm. 101; The Oler, 14 Amer. Law Reg. N. S. 300.

[4] Wh. Con. of Laws, § 818; U. S. *v.* Bevans, 3 Wheat. 336.

That the admiralty jurisdiction of the Federal courts is not restrained by the statutory limitation imposed in England, see Jackson *v.* The Magnolia, 20 How. 296; The Commerce, 1 Black, 574; The Belfast, 7 Wall. 624; though see U. S. *v.* M'Gill, 4 Dall. 426. The test of the jurisdiction, in case of maritime contracts, is the thing the contract is to perform; not the place of solemnization nor the place of performance. Hence, as maritime contracts have been considered contracts to carry passengers on navigable waters (The Moses Taylor, 4 Wall. 411); and marine insurances (Ins. Co. *v.* Dunham, 11 Wall. 1); but not contracts to build ships; Morewood *v.* Enequist, 23 How. 491. Torts committed on navigable waters are said to be always cognizable in admiralty; The Belfast, 7 Wall. 624. And the Federal courts have jurisdiction of proceedings *in rem* for a collision in state territorial waters; The Belfast, *ut supra;* The Commerce, 1 Black, 574. Contracts of charter party are cognizable even though made abroad and to be performed in a foreign ship; Maggie Hammond, 9 Wall. 435. That maritime law, when part of the common law, follows the common law in its procedure, see The J. F. Spencer, 3 Ben. 337; Richmond *v.* Copper Co., 2 Low. 315.

it was a system of laws intended to have operation upon the interests of navigation, and that whether that navigation took place upon salt water or upon fresh water was entirely immaterial, and that the constitution of the United States, when it declared that the courts of the United States should have jurisdiction in admiralty, meant that they should have jurisdiction in all that class of cases which heretofore had been called admiralty cases, whether they grew out of salt-water transactions or contracts, or fresh-water contracts and transactions." "Every steamboat becomes, in regard to suits concerning its transactions, its contracts, in regard to torts committed by its officers, subject to the admiralty jurisdiction of the Federal courts."[1]

[1] Mr. Justice Miller, South. Law Rev., April, 1878, p. 87.

In the B & C, District Court, N. D. Illinois, November 5, 1883 (18 Fed. Rep. 543), it was held that a canal used by vessels engaged in interstate traffic as a public water-way, though entirely within the limits of one state having exclusive control of it, with power in such state to close it at any time, is a part of the "navigable waters of the United States," and subject to the jurisdiction of admiralty. The opinion on this point by Blodgett, J., is as follows:—

"This is a libel to recover damages for a collision which took place between the canal-boat Brilliant, owned by libelant, and the steam canal-boat B & C, on the waters of the Illinois and Michigan canal, about four miles from Bridgeport, the evening of August 8, 1882. Two defences are urged:—

"(1) That the tort complained of is not within the jurisdiction of admiralty, having occurred on the waters of the Illinois and Michigan canal, an artificial water-way, wholly within the jurisdiction of the state of Illinois, and constructed and controlled by the state. (2) That the collision was occasioned by the negligence of those in charge of the Brilliant, and not by reason of any fault of those in charge of the B & C.

"This question of jurisdiction was before the district court of the southern district of New York in the case of Malony v. City of Milwaukee, 1 Fed. Rep. 611, where it was held that the court had jurisdiction of this class of cases. I cannot more clearly state my own conclusion as to the present condition of the law on this point than by quoting from the opinion of Judge Choate in that case:—

"'Without going at large into a discussion of the reasons for and against the jurisdiction, it is enough for the disposition of the point in this case to say that, upon a careful perusal of the opinions delivered by the supreme court, which touch upon the question, it seems to me that the test established for determining the jurisdiction in admiralty, in a case of alleged maritime tort, not on tide-water, is whether the place in which it was committed is upon the "navigable waters of the United States," and that an artificial water-way or canal, opened by a state to public use for purposes of commerce, and while, in fact, used as a highway of

§ 524. The Federal courts have no jurisdiction, it has been held, over any offence which is not made specifically punishable by the constitution, laws, or treaties, of the United States.[1] This has been sometimes expanded into the general statement that the Federal courts cannot resort to the common law for the definition of crimes. But this statement is too broad. That an offence, to be punishable in a Federal court, must be made so by constitution, statute, or

Federal courts have no common law jurisdiction of crimes, but statutory jurisdiction is exclusive.

commerce between the states of the Union, and between foreign countries and the United States, is "navigable water of the United States," within the meaning of that term as used to define and limit the jurisdiction of the admiralty courts; nor, as it seems to me, is there any force in the suggestion that this proposition trenches upon the rightful power and jurisdiction of the state through whose territory and by whose law, in force for the time being, the canal is so opened and used, because the exercise of this jurisdiction does not in any way in itself impair or affect the right of the state, whatever that right may be, to withdraw or terminate that dedication of its property to the public uses of commerce. At any rate, considering the present state of authority and practice in the courts inferior to the supreme court, I do not feel at liberty to decline the jurisdiction.'

"The same view of the law was taken by Judge Emmons in the case of The Avon, 1 Brown, Adm. 170. See, also, the case of The Oler, 14 Amer. Law Reg. 300. And this court has taken jurisdiction without challenge of several cases of tort occurring on the Welland canal. I therefore conclude that this question of jurisdiction may be considered as settled, until the matter shall be otherwise adjudged by the supreme court of the United States. If there is jurisdiction in admiralty over torts committed on the Welland canal, I can see no reason or principle which should deny such jurisdiction of torts occurring on the waters of the Illinois and Michigan canal. The craft used upon this canal, although not of as large tonnage as those usually navigating the Welland canal, are yet of the tonnage which brings them within the cognizance of admiralty courts. It may be urged, I think, with some force in this case, that the Illinois and Michigan canal is a carrying place connecting the waters of the Mississippi and St. Lawrence rivers, within the meaning of the ordinance of 1787, and by such ordinance is made a common highway for all citizens of the United States. Another consideration which it seems to me is not to be overlooked in determining the control of admiralty over this water-way, is the fact that, although constructed by the state of Illinois, the cost was largely defrayed by an appropriation of the public lands of the United States, thus giving it, both by the ordinance and the means from which it was built, the character of a national thoroughfare. The defence as to jurisdiction will therefore be overruled."

[1] U. S. *v.* Hudson, 7 Cranch, 32; U. S. *v.* Cruikshank, 92 U. S. 564, per Clifford, J., and other cases cited; Whart. Crim. Law, 8th ed., § 254.

treaty, is conceded; but this does not preclude the Federal courts from turning to the common law for the purpose of defining terms in constitution, statute, or treaty, by which offences are designated. And that this should be the case is a prerogative of the judicial office inwrought in its nature.[1] The Federal courts, therefore, while resorting to statute to know what offences are indictable, must resort to the common law to know what the offences thus made indictable mean.[2] —By the Revised Statutes, § 711, subs. 1, the courts of the United States have jurisdiction, exclusive of the courts of the several states, "of all crimes and offences cognizable under the authority of the United States." This modification of the old statutes has been held to work an entire exclusion of state jurisdiction over offences against the United States,[3] and this has been held to be the case with prosecutions for passing counterfeit money;[4] and for perjury before a Federal tribunal.[5] It is true that it was at one time supposed that under an act of congress giving power to a state court to try offences against the United States, such offences could be prosecuted in a state court.[6] But the preponderating opinion now is that such a transfer of power cannot be constitutionally made, and that the statutes in question can confer on state courts no jurisdiction of offences against the general government.[7] Where, however, an offence has two aspects, one

[1] *Supra*, §§ 30, 114.

[2] Whart. Crim. Law, 8th ed., § 253, where this question is discussed. That this is the general rule, see Rice *v.* R. R., 1 Black, 360; McCool *v.* Smith, 1 Black, 459.

[3] Houghton, *ex parte*, 7 Fed. Rep. 657; 24 Alb. L. J. 145.

[4] Ibid.

[5] See Brown *v.* U. S., 14 Am. Law Reg., N. S. 566. S. C., under name of Bridges, *ex parte*, 2 Woods, 428. That this is within the constitutional power of congress, see Fox *v.* Ohio, 5 How. 410; Com. *v.* Fuller, 8 Met. 313; Com. *v.* Barry, 116 Mass. 1.

[6] Houston *v.* Moore, 5 Wheat. 27, Washington, J.; U. S. *v.* Smith, 1 South. 33; Com. *v.* Schaffer, 4 Dall. App. xxvi.; Buckwalter *v.* U. S., 11 S. & R. 193; State *v.* Buchanan, 5 Har. & J. 500; State *v.* Tutt, 2 Bailey, 44; State *v.* Wells, 2 Hill, S. C. 687.

[7] Whart. Crim. Law, 8th ed., § 266: Houghton, *ex parte*, 7 Fed. Rep. 657; U. S. *v.* Stearns, 2 Paine, 300; U. S. *v.* Cornell, 2 Mason, 60; State *v.* Pike, 15 N. H. 83; Wetherbee *v.* Johnson, 14 Mass. 412; Ely *v.* Peck, 7 Conn. 239; People *v.* Lynch, 11 Johns. 549; U. S. *v.* Lathrop, 17 Johns. 4; Com. *v.* Feely, 1 Va. Cas. 321; Jackson *v.* Rose, 2 Va. Cas. 34; State *v.* McBride, Rice, 400; People *v.* Kelly, 38 Cal. 145. That perjury before a state court in naturalization procedure is cognizable before

against the United States, the other against a state, each sovereign may prosecute for the aspect of the offence directed against itself.[1] Nor would a Federal statute precluding state courts from prosecuting such aspects of an offence as are of state cognizance (*e. g.*, passing counterfeit money as cheats on citizens) be constitutional.[2]

a court of the state where the false oath was taken, is affirmed in State *v.* Whittemore, 50 N. H. 245; Rump *v.* Com., 30 Penn. St. 475; but denied in People *v.* Sweetman, 3 Parker, C. C. 358.

State "functionaries cannot accept any jurisdiction conferred on them by the Federal government, unless the right to impose this jurisdiction is ceded by the state to the Federal government. Otherwise the Federal legislature could appropriate to itself the time, the duty, and the allegiance of state officials, and thereby put them under its immediate control." Whart. Crim. Law, 8th ed., § 266.

[1] *Supra*, § 381; Whart. Cr. Pl. and Pr., § 442; Com. *v.* Tenny, 97 Mass. 50; Com. *v.* Felton, 101 Mass. 204; Com. *v.* Barry, 116 Mass. 1; Jett *v.* Com., 18 Grat. 933; Sizemore *v.* State, 3 Head, 26; State *v.* McPherson, 9 Iowa, 53; People *v.* Kelly, 38 Cal. 145; State *v.* Brown, 2 Oregon, 221.

That passing counterfeit money may be thus prosecuted in a state court when a cheat is practised on the state or its citizens, see Fox *v.* Ohio, 5 How. 410; U. S. *v.* Marigold, 9 How. 560; Com. *v.* Fuller, 8 Met. 313; Manley *v.* People, 3 Seld. 295; Sutton *v.* State, 9 Ohio, 133; Chess *v.* State, 1 Blackf. 198; Snoddy *v.* Howard, 51 Ind. 569; Hendrick *v.* Com., 5 Leigh, 707; Jett *v.* Com., 18 Grat. 933; State *v.* Antonio, 3 Brev. 562; State *v.* Tutt, 2 Bailey, 44; Harlan *v.* People, 1 Doug. Mich. 207.

"The states may constitutionally provide for counterfeiting of coin and passing of counterfeit money, since these are offences against the state, notwithstanding they may be offences against the nation also." Cooley's Const. Lim., 4th ed., 25.

That a prosecution for passing the money, with intent to cheat the citizens of a state, does not bar a prosecution for passing counterfeit money in a Federal court, see U. S. *v.* Marigold, 9 How. U. S. 560; Moore *v.* Illinois, 14 How. 13.

[2] *Supra*, § 381; Whart. Crim. Law, 8th ed., § 266; Wh. Cr. Pl. and Pr., § 242; see, however, *In re* Brosnahan, Jr., 18 Fed. Rep. 63, and a note thereto on this point, ib. p. 74.

That congress has power to provide for the punishment of a guardian who embezzles his ward's pension money, see U. S. *v.* Hall, 98 U. S. 343.

In Houghton, *ex parte*, 7 Fed. Rep. 657, 24 Alb. L. J. 45 (cited above), the opinion was given by Wheeler, J., who said:—

"This is a motion by the relator for a discharge on habeas corpus from imprisonment in a prison of the state, under sentence of a court of the state for passing counterfeited national bank bills, on the ground that the state court had no jurisdiction over this offence, and that the imprisonment is contrary to the constitution and laws of the United States.

"The constitution of the United States provides:—

"'Article VI. This constitution, and the laws of the United States

Territorial courts may be constituted by congress.

§ 525. It is in the power of congress to constitute territorial courts, with jurisdiction to determine all questions in law or equity which may arise in the

which shall be made in pursuance thereof, . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.'

"Under this provision the limits of power between the United States and the several states are to be sought for in that constitution and the laws of congress which have been made pursuant to it. It provides, article 1, section 8: 'The congress shall have power . . . to coin money, regulate the value thereof, and of foreign coin: . . . to provide for the punishment of counterfeiting the securities and current coin of the United States.' This provision extends to passing counterfeited coin and securities, as well as to counterfeiting them. United States *v.* Marigold, 9 How. 570. It also provides, article 3, section 2, that 'the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, . . . and fifth amendment; . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.' It is well established that congress may exclude the jurisdiction of the courts of the states from offences within the power of congress to punish. Houston *v.* Moore, 5 Wheat. 1; The Moses Taylor, 4 Wall. 411; Martin *v.* Hunter, 1 Wheat. 304; Com. *v.* Fuller, 8 Metc. (Mass.) 313; 1 Kent's Com., 399.

"National banks are organized under the laws of the United States; their bills are issued to them by the treasury department of the United States, secured by bonds of the United States on deposit there, which fact is to be expressed on their face by the signatures of the treasurer and register, and the seal of the treasury of the United States. Rev. Stat., § 5172. They are securities of the United States which congress has power to protect by punishing counterfeiting them, and the passing of counterfeits of them, and are so declared to be in the laws of the United States. Rev. Stat., § 5413. Whether the state court had jurisdiction over this offence or not depends upon whether congress has excluded that jurisdiction or left it to those courts under the laws of the states.

"The judiciary act of 1789 provided, section 11:—

"'That the circuit courts shall have . . . exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct. . . .' 1 Stat. at Large, 78.

"By the act of April 21, 1806, provision was made for punishing counterfeiting of the coin of the United States, and by that of February 24, 1807, for that of forging notes of the bank of the United States, and by that of March 3, 1825, for that of forging certificates of public stocks or other securities of the United States, counterfeiting coin of the United States and other countries, and passing counterfeit coin. Section 26 of the act of 1825 provided, as similar sections in each of the other acts had done, that nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the sev-

territories for which they are appointed.[1] The process in such courts, however, may be moulded by the territorial legislatures.[2]

eral states over offences made punishable by this act; 4 Stat. at Large, 122.

"This provision expressly left to the states jurisdiction of the particular offences mentioned in those acts, the same as if congress had never exercised its powers to punish them.

"A person was convicted under a statute of Ohio for passing counterfeit coin, and the conviction was upheld as not being contrary to the laws of the United States; Fox *v.* Ohio, 5 How. 410. So under a statute of Vermont (State *v.* Randall, 2 Aik. 89), and a statute of Massachusetts (Commonwealth *v.* Fuller, 8 Metc. 313). But upon demurrer to an indictment under the laws of New Hampshire for punishishing perjury generally, for perjury committed in proceedings under the bankrupt act of 1841, it was held that the state court had no jurisdiction over that offence; State *v.* Pike, 15 N. H. 83. In Moore *v.* Illinois, 14 How. 13, the respondent was convicted of harboring and secreting a negro slave contrary to the statute of Illinois. It was argued that the state court had no jurisdiction, because the laws of the United States provided for punishing obstructing the owner of a negro slave in endeavoring to reclaim him, and concealing the fugitive after notice; but the jurisdiction of the state was maintained on the ground that the offences were different.

"The supreme court of Massachusetts took jurisdiction of an embezzlement of a private special deposit in a national bank by an employé of the bank, on the ground that congress had not provided for that particular offence; Commonwealth *v.* Tenny, 97 Mass. 50. The national bank acts were passed in 1863 and 1864, and provision was made for the punishment of counterfeiting their bills and passing the counterfeits, but there was no reservation to the state in making these provisions. Without such reservation the states had no power left to them to supplement the acts of congress by legislation covering the same ground; Sturges *v.* Crowninshield, 4 Wheat. 122; Prigg *v.* Pennsylvania, 16 Pet. 539.

"The statute of Vermont, under which the relator was indicted and is imprisoned, was passed in 1869. At that time, and until the adoption of the Revised Statutes of the United States, June 22, 1874, there was nothing giving up to the states the jurisdiction which congress had taken over this offence, or any part of it. The Revised Statutes contain a title of 'Crimes,' in which the provisions for punishing counterfeiting national bank bills are placed. It also has this general provision:—

"'Section 5328. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof.'

"The provisions of the judiciary act relating to the criminal jurisdiction of the circuit court, are brought into section 629, twentieth, with the qualifica-

[1] Clinton *v.* Englebrecht, 13 Wall. 434.

[2] Hornbuckle *v.* Toombs, 18 Wall. 648.

As to territories, see, further, *supra*, §§ 375, 462 *et seq.*

Federal courts adopt state rules and practice

§ 526. In discussing the difficult question of the relation of federal to state law, it must be in the first place remembered that there are two different

tion of exclusive cognizance changed to 'except where it is, or may be, otherwise provided by law.'

"If these provisions were all, it might be said that congress had expressly withdrawn the jurisdiction before taken of offences mentioned in the title of 'Crimes,' so far as the states might choose to exercise similar jurisdiction through their courts. But chapter 12 of the title on 'Judiciary,' entitled 'Provisions common to more than one court or judge,' was placed in the Revision and enacted as a part of the Revised Statutes. It commences with section 711:—

"'The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: *First*, of all crimes and offences cognizable under the authority of the United States.'

"This provision was not in the statutes of the United States anywhere before. It was framed *ex industria*, and placed there for some purpose. It is not merely the provision of the judiciary act relating to the jurisdiction of the circuit courts brought forward and placed here, as well as the chapter relating to those courts, to express the same thing again in another connection; but it is a different thing. That provision made the jurisdiction of the circuit courts exclusive of all other courts, Federal as well as state, except as otherwise provided. This applies to all the courts of the United States, and expressly excludes, and seems to be made expressly to exclude, the jurisdiction of the courts of the states. Both provisions are necessary to place the jurisdiction in these cases where it is reposed, among the Federal courts, and exclude that of the state courts, and the latter would be unnecessary if that of the state courts was not to be excluded.

"The language of the section quoted from the title on 'Crimes' does not save the jurisdiction of the courts of the states over the offences made punishable by that title, as section 26 of the act of 1825 saved it over offences made punishable by that act. It says nothing about offences, as such, to express or specify its application. There are many offences made punishable by that title—some of them such as never could be offences against the laws of any of the states; some such as the obstructing the executive officers in the performance of their duties, and the service of the processes of the courts of the United States, where the same act might constitute one offence against the laws of the United States, and another different offence against the laws of the states. This section of the title is general, and might be applicable to all these if taken in its broadest sense. It might be, or be claimed to be, that making any act punishable under the laws of congress would prevent the states from punishing a different offence involved in the same act. An assault upon a marshal, to obstruct his service of process, would be punishable under this title for the obstruction, but not for the assault; the assault might be punishable under the state laws, but not the obstruction. The title makes certain offences against the laws of the United States punishable. This section seems to mean that making them so punishable shall not prevent the states from taking hold of any offence

processes by which a case can reach the supreme court of the United States. The first process arises

as to exclusively state questions.

which may be involved that are contrary to the state laws, and not cognizable under the United States laws, and punishing them. And taken in connection with the section making the jurisdiction of the United States courts over offences cognizable under the authority of the United States wholly exclusive of the state courts, it must mean this. Such construction leaves all the sections standing operative, while the other would leave the one declaring the jurisdiction exclusive inoperative. The section on 'Crimes' is later than the other in the order of the statutes, and might be said to be controlling for that reason; but that ground of inference is expressly removed by the statutes themselves, which provide that no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed. Section 5600.

"The act of passing these counterfeited bills, made punishable under the statute of the state under which the relator was indicted, might, and often would, concur with others to constitute a cheat which would be punishable by laws of the state of long standing against obtaining money or goods by privy or false tokens. Gen. Stat. Vt., 671, § 23.

"It was upon this ground that the passing the counterfeited national bank bill was a mere private cheat under the laws of Virginia, that the conviction was upheld by the majority of the court in Jett v. Virginia, 18 Gratt. 933 (7 Am. Law Reg. N. S., 260), cited at this hearing.

"The indictment against the relator does not charge him with passing a counterfeited national bank bill, knowing the same to be false, with intent to defraud one Margaret McDaniels, which is, in terms, a somewhat different offence from that made punishable by the laws of the United States, which consists merely in passing such counterfeited bill, knowing it to be counterfeited. R. S., § 5415. The indictment appears to have been drawn according to the statute in force before the act of 1869, which made an intention to defraud an ingredient of the offence, but did not in exact language apply to national banks. Gen. Stat. Vt., 678, § 3. But this section of the general statutes was expressly superseded by the act of 1869, and the element of an intent to defraud was left out, so that the offence made punishable by the laws of Vermont was the passing such counterfeit bill, knowing it to be counterfeited, precisely the same offence made punishable by the law of the United States. The material allegations of an indictment are those which set forth the charges which are contrary to the law and make up the offence, and not those which charge things not contrary to the law, however morally wrong they may be, and which are not necessary to constitute the offence. A plea of not guilty to this indictment would only put in issue the passing the counterfeit bill knowing it to be such, and the plea of guilty only confessed as much. The relator, therefore, stands convicted in the state court of precisely an offence cognizable under the authority of the United States, and is restrained of his liberty under that conviction.

"There are respectable opinions and weighty authorities which hold that in the United States there are

from the peculiar character of the matter of the suit, in which case the jurisdiction of the Federal courts is neces-

two governments—the United States, within the sphere marked out by the constitution, and the several states—and that the same act may be an offence, and some of them that it may be the same offence, against each, for which punishment may be inflicted by each, and that the safety of the accused from excessive punishment under the two systems lies in the pardoning power, and in the benignant spirit with which the laws of each are administered. United States *v.* Wells, 11 Am. Law. Reg. 424; Mr. Justice Daniell in Fox *v.* Ohio, 5 How. 410; Mr. Justice Johnson in Houston *v.* Moore, 5 Wheat. 1.

"That the same act, constituting different criminal offences, may be punished for one under the United States, and for another under the state, cannot, under the authorities before cited, well be doubted, and most of the examples cited to show that the same offence may be punished by both are examples of that class. That the states cannot make criminal offences out of what the United States makes lawful, nor against the laws of the United States, was well settled in Prigg *v.* Pennsylvania, 16 Pet. 539; The Moses Taylor, 4 Wall. 411; and other cases before cited. The provision in the constitution prohibiting putting twice in jeopardy for the same offence was for the protection of the people from oppression. Houston *v.* Moore, 5 Wheat. 1. It may be said that this only applied to the tribunals of the United States; but if so it is a restraint of the courts under the laws of congress. Under it, congress could not make the same offence punishable twice. And if congress could not do this directly, it could not indirectly, by creating an offence and leaving the states to punish it once, and providing by its own laws to punish it again.

"This offence appears to be one over which the state court had no jurisdiction, and the relator is restrained of his liberty without warrant of law. The next question is whether he can be relieved in this mode.

"In 1867 the writ of *habeas corpus* from the courts and judges of the United States was extended to persons in custody, in violation of the constitution, or of a law or treaty of the United States. R. S., § 753. The law of the United States was, and is, that the relator should be tried by the courts of the United States, and not by those of the state, and if guilty that he should be punished according to the laws of the United States, and not under those of the state under which he is in custody. This court has jurisdiction of the relator under these provisions by this writ.

"The inquiry into the cause of his confinement is not a review of the proceedings of the state court. If the attention of that court had been called to this aspect of the case, probably this proceeding would have been wholly unnecessary; but the record shows that it was not. The point here is not at all that the relator was not proceeded with in a proper manner by the state court, but that the court had no jurisdiction over him for this offence. In such cases the remedy may be by *habeas corpus*. *Ex parte* Lange, 18 Wall. 163.

"Brown *v.* U. S., 14 Am. Law Reg. 566, before Erskine, J., and afterward before Mr. Justice Bradley, is an authority that section 711 gives exclusive jurisdiction to the courts of the

sarily dominant and absorptive. This is the case with litigation as to federal laws and treaties, and as to all other matters

United States over offences cognizable under the authority of the United States, and that *habeas corpus* from a Federal court or judge is a proper remedy.

"This is not a proceeding for relieving criminals at all from just punishment. It is intended to relieve persons from punishment contrary to the laws of the United States, but not from liability to be punished according to those laws. If the relator was still liable to punishment according to those laws, he would be held by order of court until the district attorney could proceed against him; but the offence for which he has already suffered considerable punishment is now apparently barred by the statute of limitations of the United States. Therefore further detention would be unavailing."

On the other hand, in Dashing *v.* State, 78 Ind. 357, we have the following opinion of the court delivered by Worden, J.:—

"The appellant was indicted in the court below for the violation of a law of this state by fraudulently uttering and publishing as true, 'a piece of false, forged, and counterfeit coin, resembling, and apparently intended to resemble and pass for silver coin of the United States of America, called a dollar, which lawful coin was then and there current in the said state of Indiana.' Upon trial he was convicted, and overruling a motion in arrest, judgment was rendered against him. The only question made here is whether a conviction can be had in such case in a state court. It has been held in this state from an early period, that the states have the power to punish such offences. Chess *v.* State, 1 Blackf. 198; Snoddy *v.* Howard, 51 Ind. 411. The authorities upon the question are not uniform, but we decline to enter upon a discussion of the question as an open one in this state, further than to notice some acts of congress bearing upon the question, which will be adverted to further on in this opinion. We may observe, however, that in the case of Fox *v.* State of Ohio, 5 How. 410, it was held by the supreme court of the United States, Mr. Justice M'Lean dissenting, that the power conferred upon congress by the constitution of the United States upon the subject, did not prevent the states from passing laws on the same subject. The theory is explained by what was said by Mr. Justice Grier in the case of Moore *v.* People of the State of Illinois, 14 How. 13, a case in which Mr. Justice M'Lean also dissented. It was there said: "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both.' The 8th section of article 1 of the constitution of the United States, provides that 'the congress shall have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures. To provide for the punishment of counterfeiting the securities and current coin of the United States.' The grant of power to congress by the constitution to provide for the punishment of counterfeiting the securities and current coin of the United States, does not of itself deprive the states of the right to make such counterfeiting a crime against them, and to punish it

in respect to which the Federal government is supreme. The second process arises from the peculiar territorial position of

accordingly. That depends upon the action of congress. If congress, though providing for the punishment of such counterfeiting as a crime against the United States, leave the several states free to make such counterfeiting a crime against them they may do so. This subject is well elucidated by Chancellor Kent, who says: 'The judiciary act' (1789) 'grants exclusive jurisdiction to the circuit courts of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide, and this accounts for the proviso in the act of the 24th of February, 1807, c. 75, and in the act of the 10th of April, 1816, c. 44, concerning the forgery of the notes of the bank of the United States, declaring that nothing in that act contained should be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states over offences made punishable by that act. There is a similar proviso to the act of the 21st of April, 1806, c. 49, concerning the counterfeiters of the current coin of the United States. Without these provisos, the state courts could not have exercised concurrent jurisdiction over those offences consistently with the judiciary act of 1789. But these saving clauses restored the concurrent jurisdiction of the state courts, so far as under the state's authority it could be exercised by them. There are many other acts of congress which permit jurisdiction over the offences therein described to be exercised by state magistrates and courts. This was necessary, because the concurrent jurisdiction of the state courts over all offences was taken away, and that jurisdiction was vested exclusively in the national courts by the judiciary act, and it required another act to restore it.

"The state courts could exercise no jurisdiction whatever over crimes and offences against the United States, unless where, in particular cases, the laws had otherwise provided, and whenever such provision was made, the claim of exclusive jurisdiction in the particular cases was withdrawn, and the concurrent jurisdiction of the state courts *eo instanti* restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the state tribunals.' 1 Kent Com. (12th ed.), 398. It is claimed by counsel for the appellant that the provisions of the Revised Statutes of the United States of 1879, take away jurisdiction on the subject from the state, and vest the same exclusively in the national tribunals.

"Section 711 of the Revised Statutes of the United States, provides that: 'The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states; first of all crimes and offences cognizable under the authority of the United States.'

"This, it is claimed, vests exclusive jurisdiction in the national courts over the subject. But this section must be taken in connection with section 5328, under title 70, the subject of which is expressed to be 'crimes,' and in which provision is made for the punishment of such counterfeiting.

"Section 5328 provides that, 'Nothing in this title shall be held to take away or impair the jurisdiction of

the parties, as when they are citizens of different states, in which case the jurisdiction of the Federal courts is more or

the courts of the several states under the laws thereof.'

"It is evident by section 5328, that congress did not intend by anything enacted under that title, to impair or take away the right of the several states to enact and enforce such criminal laws as they might think proper, and, reading the two sections together, it seems to us to be clear that congress did not intend by section 711 to divest the states of the right and jurisdiction to enact and enforce their own criminal laws, though the act made criminal thereby might also be made criminal by the laws of the United States. It follows from these views that the court below had jurisdiction. The counsel for the appellant have cited the case of Sherwood *v.* Burns, 58 Ind. 502, but that case differs radically from the present one. There the plaintiff was proceeding in a state court to enforce, not a state law, but an act of congress, viz: the bankrupt act, the courts of the United States being vested with exclusive jurisdiction 'of all matters and proceedings in bankruptcy.' Here the state was enforcing its own law."

Aside from this reasoning, it may be observed that, even supposing the revised statutes are to be interpreted as taking from the state courts all jurisdiction of counterfeiting Federal paper or coin, *as offences against the United States*, no act of congress can take from the states, under the Federal constitution, the right to punish persons passing forged Federal paper or coin as *a cheat directed against the people of the state*. The offences are distinct; the latter is an offence against the state of which the Federal judiciary cannot take cognizance. See *supra*, § 381.

In Pennsylvania, in Com. *v.* Ketner, 92 Penn St. 372, it was held that the courts in that state have not jurisdiction to try an indictment against the cashier of a national bank for embezzling the funds of the bank, such embezzlement not being a common law offence or one against the statutes of Pennsylvania. "It appears," said Paxson, J., "by the return to this writ that the relator is held to answer an indictment in the court of quarter sessions of Schuylkill County, charging him, as cashier of the First National Bank of Ashland, with having embezzled the funds and property of said bank. There are three counts in the indictment, each varying the form of the charge, but not essentially changing its substance.

"It is almost needless to say that a *habeas corpus* is not a writ of error. Hence, if the court below had jurisdiction of the offence, we cannot correct its rulings in this proceeding, however erroneous they may be. On the other hand, it is equally clear that if the relator is being prosecuted for a matter which is not an indictable offence by the law of Pennsylvania, or one over which the court below has no jurisdiction, it would be our right, as well as our plain duty, to discharge him. No authority is needed for so obvious a proposition.

"Embezzlement by the cashier of a bank is not a common law offence. This indictment must rest upon some statute of this state or it cannot be sustained. Has it such support? As preliminary to this question, it is proper to say that section 5209 of the United States statutes provides specifically for the punishment of cashiers and other officers of national banks who

less coördinate with the state courts, and is conditioned, not by the merits of the case, but by the mere accident of the local

shall be guilty of embezzling the moneys, funds, or credits of such institutions. The relator was not indicted under this section, and could not have been in a state court. Our own legislation upon this subject may be briefly stated. We have, first, the Crimes Act of 1860 (P. L. 382), the 116th section of which prescribes and punishes the offence of embezzlement by any person 'being an officer, director, or member of any bank, or other body corporate or public company." Then we have the act of May 1, 1861 (P. L. 515), entitled 'A supplement to an act to establish a system of free banking in Pennsylvania, and to secure the public against loss from insolvent banks, approved 31st March, 1860,' which also prescribes and punishes embezzlement by bank officers. Lastly, there is the act of 12th of June, 1878 (P. L. 196), which amends the aforesaid 116th section of the act of 1860, by substituting a new section in its place, and imposing a different punishment. This leaves the acts of 1861 and 1878 as the only ones which could possibly support the indictment. It was urged, however, and with much force, that the act of 1861 was only intended to apply to banks organized under the free banking law, of which it forms a part; and that as to the act of 1878, the offence charged in the indictment was committed prior to its passage. This fact was formally conceded upon the argument, and while we might not be able for such reason to grant relief upon *habeas corpus*, it furnishes a conclusive reason why, upon a trial in the court below, the commonwealth could derive no aid from the act of 1878.

"We are spared further comment upon these acts for the reason that they have no application to national banks. Neither of them refers to national banks in terms, and we must presume that when the legislature used the words 'any bank,' that it referred to banks created under and by virtue of the laws of Pennsylvania. The national banks are the creatures of another sovereignty. They were created and are now regulated by the acts of congress. When our acts of 1860 and 1861 were passed there were no national banks, nor even a law to authorize their creation. When the act of 1878 was passed, congress had already defined and punished the offence of embezzlement by the officers of such banks. There was, therefore, no reason why the state, even if it had the power, should legislate upon the subject. Such legislation could only produce uncertainty and confusion, as well as a conflict of jurisdiction. In addition, there would be the possible danger of subjecting an offender to double punishment, an enormity which no court would permit if it had the power to prevent it.

"An act of assembly, prescribing the manner in which the business of all banks shall be conducted, or limiting the number of directors thereof, could not by implication be extended to national banks, for the reason that the affairs of such banks are exclusively under the control of congress. Much less can we, by mere implication, extend penal statutes, like those of 1861 and 1878, to such institutions.

"The offence for which the relator is held is not indictable at common law or under the statutes of Pennsyl-

position of the parties. In the first class of cases the Federal courts lay down an absolute system of their own to which they compel obedience. With respect to the second class of cases the general rule is that a Federal court, when acting on a case subject to the laws of a particular state, adopts the rules and practice of that state in all questions of exclusively state concern; and when a state statute or rule of law comes before the supreme court of the United States, that court will follow the construction given to such statute or rule by the tribunals of such state in all cases in which there is no conflict with the constitution or the laws of the United States. In other words, the states and the United States being distinct sovereignties, each is the supreme arbiter of the meaning of its own laws within its own sphere; and as the state courts accept the construction given by the United States courts in all questions arising under the constitution and laws of the United States, so the United States courts accept the construction given by a state court to all questions arising under the constitution and laws of such state when such questions do not involve dis-

vania. We, therefore, order him to be discharged."

In Com. *v.* Luberg, 94 Penn. St. 85, it was held by the same court that a state court has jurisdiction of an offence committed by an officer of a national bank where the offence is one indictable at common law; and it was further held that fraudulent alteration of, or making false entries in the books of a bank with intent to defraud, is indictable at common law as forgery. Paxson, J., in delivering the opinion of the court, said: "We are asked to reverse the judgment upon the ground that the offence charged having been committed by an officer of a national bank, it is not the subject of an indictment in a state court. Commonwealth *v.* Ketner, 8 W. N. C. 133, was relied on to sustain this position. Torrey was indicted as cashier of a national bank, for embezzling the funds of the bank, and he was discharged upon *habeas corpus* for the reason that the offence was not indictable at common law, and our statutes defining and punishing the offence do not apply to national banks. Here the indictment charges an offence which was a crime at common law. In Commonwealth *v.* Beamish, 31 P. F. S. 339, it was decided that the fraudulent alteration of a book known as a tax duplicate was forgery at common law. It is plain under this authority the plaintiff in error would have been indicted for forgery. The indictment here is laid under the statute, and does not charge the offence of forgery in the technical manner required by the strict rules of the common law; but, as in Commonwealth *v.* Beamish, is good under a criminal procedure act. That the act of assembly does not call it forgery makes no difference. It is the same offence."

tinctively Federal issues.[1] Such is the general rule; but it cannot be denied that the rule so imposed is subject to be swayed

[1] Livingston *v.* Moore, 7 Pet. 465; Shelby *v.* Guy, 11 Wheat. 361; Phalen *v.* Virginia, 8 How. 163; Townsend *v.* Todd, 91 U. S. 452; Lamborn *v.* Dickinson Co., 97 U. S. 181; R. R. *v.* Gaines, 97 U. S. 697; Railroad *v.* Georgia, 98 U. S. 359.

By the 34th section of the Judiciary Act of 1789 (Rev. Stat. U. S., § 721) it is provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

"This Court," said Marshall, C. J., "has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of that state have given to these laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States." Elmendorf *v.* Taylor, 10 Wh. 159.

See to the same general effect, as cases in which the supreme court of the United States followed the decisions of state courts, not as in themselves right, but as controlling the question at issue, Bell *v.* Morrison, 1 Pet. 351; Beach *v.* Viles, 2 Pet. 675; Wilkinson *v.* Leland, 2 Pet. 653; Bank *v.* Dudley, 2 Pet. 492; Green *v.* Neal, 6 Pet. 291; Wheaton *v.* Peters, 8 Pet. 591; Marlatt *v.* Silk, 11 Pet. 1; Amis *v.* Smith, 16 Pet. 303; Harpending *v.* Dutch Church, 16 Pet. 455; Bank *v.* Buckingham, 5 How. 317; Luther *v.* Burden, 7 How. 1; Nesmith *v.* Sheldon, 7 How. 812; Webster *v.* Cooper, 10 How. 448; Beauregard *v.* New Orleans, 18 How. 497; Conway *v.* Taylor's Executor, 1 Black, 604; Leffingwell *v.* Warren, 2 Black, 599; Seybert *v.* Pittsburgh, 1 Wall. 272; Nichols *v.* Levy, 5 Wall. 433; Provident Inst. *v.* Massachusetts, 6 Wall. 611; Randall *v.* Brigham, 7 Wall. 523; Richmond *v.* Smith, 15 Wall. 429; Walker *v.* Comm., 17 Wall. 648; Aicardi *v.* Alabama State, 19 Wall. 635; Township *v.* Marcy, 92 U. S. 289; Chenning Canal Bank *v.* Lowery, 93 U. S. 72; Atlantic, etc. R. R. Co. *v.* Hopkins, 94 U. S. 11; Peik *v.* Railway Co., 94 U. S. 164; Township of E. O. *v.* Skinner, 99 U. S. 255; Boyd *v.* Alabama, 94 U. S. 645; Adams *v.* Nashville, 95 U. S. 19; Hall *v.* De Cuir, 95 U. S. 485; Davie *v.* Briggs, 97 U. S.

by conflicting considerations. There are strong reasons, on the one side, for holding that in all cases subject to the jurisprudence of a state the law of that state should be followed.

(1) This is the rule of private international law. If it be shown that a particular case is subject to the jurisdiction of a particular foreign state the law of that state is followed; and so anxious are the courts to preserve this rule intact that they require the foreign law to be proved to them by experts, and accept it when so proved as binding.[1] On questions distinctively subject to the law of a state, such state bears to the Federal courts the relation of a foreign country. This has been held to be the case with regard both to property and to status; there is no reason why it should not be held to be the case with regard to contracts.

(2) Any other view would produce great confusion. The same case would frequently depend for its decision upon the purely fortuitous question whether the parties were citizens of the same or of different states. And a party, by changing his domicil, or selling his claim to a citizen of another state, might change the applicatory law.

On the other side, the following reasons may be given for the conclusion that in matters of general mercantile law the supreme court must adopt a consistent system of its own.

(1) Mercantile law in its general sense is of federal concern just as regulating commerce is of federal concern, and a uniform rule is as important in one case as in the other.

(2) The confusion arising from a difference of jurisprudence between the supreme court and a state as to a particular case is by no means so great as the confusion arising from a difference of jurisprudence between successive rulings of the supreme court itself. On the theory of the supreme court following its own system we would at least have emanating from that august tribunal a consistent scheme of mercantile

628; Orvis *v.* Powell, 98 U. S. 176; Kain *v.* Gibboney, 101 U. S. 362; Bondurant *v.* Watson, 103 U. S. 281.

Ordinarily the judgment of the highest court of a state, to the effect that a particular statute is in conformity with the prescriptions of the state constitution, will be regarded as conclusive by the supreme court of the United States. Atlantic R. R. *v.* Georgia, 98 U. S. 359; North Bennington Bank *v.* Bennington, 16 Blatch. 53.

[1] See *supra*, §§ 314 *et seq.*

law as being *quasi* international law. On the theory of the supreme court following the state courts on all questions which may be subject to their jurisprudence, we would be bereft of such a system, and the rulings of the supreme court, on matters in which under our federal system a consistent rule is required, would present as many shades of opinion as there are states in the Union. Nor is this all. The supreme court of the United States would be compelled to form its own opinion, without guidance from the state courts, in all cases arising in the territories, or coming before it under a treaty, or distinctively under the federal constitution or laws. The decisions of the supreme court of the United States, therefore, on disputed questions of mercantile law, would fall under two general heads: first, those adopted by it as representing its own views; secondly, those adopted by it as the mouth-piece of whichever of the forty states it was in which the case arose. But here a new difficulty comes up. There are many cases of mercantile law which involve the law of more than one state. The supreme court of the United States, therefore, in seeking for the law which is to bind it, has not merely to explore the reports of the state supposed to have jurisdiction in order to know what its law is, but it has to settle the question, often of all others the most uncertain, as to which state it is whose law binds. But as in mercantile matters certainty and uniformity of law are of first importance, it is far better, so it is argued, that a certain and uniform law should be imposed by the supreme court of the United States, than that we should be left as we would be if that court has to follow the lead in such matters of the state courts, without such certainty or uniformity. And if the state courts follow the lead of the supreme court of the United States on all matters of mercantile law, this obviates the objection based on the mischief of giving parties a choice of jurisdictions. We should not only have a uniform system of mercantile law throughout the United States, but litigation would be relieved from the discredit which arises when there is an election, based on residence, between conflicting jurisprudences.

It is not strange that when the arguments for and against the adoption of state law in questions of this class are in such

equipoise, the supreme court of the United States should have wavered in its conclusions. At first, when the court was comparatively new at its work, finding as it did state judiciaries of eminence and experience existing as established institutions, while its own prerogative as the organizer of a uniform system of interstate and international law was as yet unexercised, if not unrecognized, it took from the state courts, as if it were a matter of course, the law of such cases as were subject to state jurisdiction. Afterwards, when it accepted, in the gradual development of national strength, the position of the final arbiter of constitutional and of international law, and when the number of states had so greatly increased as to proportionally increase the confusion arising from multiplicity of ultimate appellate courts, the importance of establishing for the Federal system a uniform rule became more manifest, and the court entered on a line of rulings tending to establish a uniform system of mercantile law.[1] The supreme court has also held that in equity cases not distinctively local in character it will follow a consistent system established by itself;[2] an additional reason in such cases being that the Federal statute, above cited, requiring the Federal courts to follow applicatory state laws, applies only to suits at common law, and not to suits in equity. It has also been held that in such questions of construction of documents as are of general interest, the court will follow its own specific system of interpretation, in preference to that adopted by the courts of a state having jurisdiction;[3] though when the construction of a will has been settled by

[1] See Swift *v.* Tyson, 16 Pet. 1; Railroad Co. *v.* Bank, 102 U. S. 14, and cases there cited. It was held that even a statute of a state does not bind a case of mercantile law, arising in such state, where the suit is brought, in consequence of the distinctive citizenship of one of the parties, in a Federal court. Watson *v.* Tarpley, 17 How. 517. The rule has also been applied to insurance cases; (Carpentier *v.* Ins. Co., 16 Pet. 495; Gloucester Ins. Co. *v.* Younger, 2 Curt. 322); to suits on coupons on municipal bonds (Venice *v.* Murdoch, 92 U. S. 494); and even to suits for negligence. Chicago *v.* Robbins, 2 Black, 418.

[2] Robinson *v.* Campbell, 3 Wheat. 212; Boyle *v.* Zacharie, 6 Pet. 648; Livingston *v.* Story, 9 Pet. 632. That this is not the case in matters of an exclusively local character, see Ewing *v.* St. Louis, 5 Wall. 413.

[3] Foxcroft *v.* Mallett, 4 How. 333; Thomas *v.* Hatch, 3 Sumn. 170; Lane *v.* Vick, 3 How. 464.

the courts of the testator's domicil, this will not be departed from by the Federal courts.[1] Between the two positions above stated, an intermediate view has been expressed. As is elsewhere seen, it is maintained by Savigny that a contract absorbs into itself the local law to which the parties making it understood it to be subject at the time it is made; and this local law is, under ordinary circumstances, the law of the place in which they are at the time domiciled. Something like this is the following position taken by Chief Justice Waite: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contractual rights that would be given to a legislative amendment, that is to say, make it prospective, but not retroactive."[2]

If the distinctions above taken are correct, the supreme court of the United States will not consider itself bound in the following instances by the decision of the court of a state, having either coördinate or primary jurisdiction of the litigated case:—

1*st.* Where the question is one involving a construction of the Federal constitution or of Federal law.

[1] Henderson *v.* Griffin, 5 Pet. 151. On the other hand, the interpretation given by a state court to a statute of a state will be followed by the Federal courts when such interpretation is definitely settled. Suydam *v.* Williamson, 24 How. 427. Chief Justice Marshall went so far as to continue an argument as to the construction of a state law, when he was informed that the question was then pending before a state court; his object being to obtain the decision of the state court as that which was to rule the case. Bank *v.* Dudley, 2 Pet. 492; Springer *v.* Foster, 2 Story, 383; and Christy *v.* Pridgeon, 4 Wall. 196; Davie *v.* Briggs, 97 U. S. 628.

That the supreme court will not review the decision of a state court affirming a foreign divorce, see Roth *v.* Ehman, 107 U. S. 319.

[2] Douglass Co. *v.* Pike, 101 U. S. 677; following Gelpcke *v.* Dubuque, 1 Wall. 175; Meyer *v.* Muscatine, 1 Wall. 384; Thompson *v.* Lee Co., 3 Wall. 327; Mitchell *v.* Burlington, 4 Wall. 270; Chicago *v.* Sheldon, 9 Wall. 50; Warren *v.* Marcy, 96 U. S. 96. See Koshkonong *v.* Burton, 104 U. S. 668, where it was held that a declaratory statute, giving a particular construction to a prior statute, could not affect antecedent contracts; see *supra*, § 479. In Butz *v.* Muscatine, 8 Wall. 575, the court said: "We are of opinion that, under the statutes of Iowa in force when the contract was made, the relator is entitled to the remedy he asks, and that his right can no more be taken away by subsequent judicial decision than by subsequent legislation. It is as much within the sphere of our powers and duties to protect the contract from the former as from the latter, and we are no more concluded by one than by the other." And see on this point discussion, *supra*, § 480.

2*d*. Where the question is one of international or interstate law, or one involving matters of mercantile law, or of equity, which have an international or interstate scope, or one of construction of documents involving general principles settled by the supreme court.

3*d*. Where the question relates to the obligation of a contract entered into in accordance with state law, which law the state has subsequently changed.

4*th*. Where the contract was made in conformity with a construction given by the supreme court of the United States, in which case that court will not reverse its ruling because a state court has intermediately decided differently.[1] For this line of decisions, also, the reason, as we have seen, may be given that as parties may be assumed to incorporate in their contracts the meaning assigned by the applicatory law, to change such law so as to modify the contract contravenes the constitutional limitation.

5*th*. But in criminal cases, not involving Federal law, the Federal courts will follow the rulings of the court of the state in which the offence was committed.[2]

[1] *Supra*, § 480; Rowan *v*. Runnels, 5 How. 134; Sims *v*. Hundley, 6 How. 1; though see Fairchild *v*. Gallatin, 100 U. S. 47; Roberts *v*. Bolles, 101 U. S. 120.

[2] Boyd *v*. Alabama, 94 U. S. 645. See on the topic of this section the article by Mr. Wm. M. Meigs, of Philaphia, already noticed, in the American Law Review for 1883, pp. 451 *et seq*.

By Rev. Stat., § 858, the state law as to competency of witnesses is to be followed in all cases when not otherwise provided by statute; see Texas *v*. Chiles, 21 Wall. 488; Railroad Co. *v*. Pollard, 22 Wall. 341.

Pana *v*. Bowler, 107 U. S. 529, was a case on one of a series of bonds issued by the town of Pana, in the state of Illinois, which had been issued under a power to issue such bonds if authorized at a popular election. The bonds recited that this election had duly taken place, and the authority given. It was alleged by the town that the election was irregular, and it was held by the supreme court of Illinois that this was a good defence; Lippincott *v*. Pana, 92 Ill. 24. The supreme court of the United States held that bonds in such case were valid in the hands of a *bona fide* holder, and that the holder of negotiable bonds issued to bearer was presumed to be a *bona fide* holder. "It is," said Woods, J., giving the opinion, "insisted that this court is bound to follow this decision of the supreme court of Illinois and hold the bonds in question void. We do not so understand our duty. Where the construction of a state constitution or law has become settled by the decision of the state courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus we may

§ 527. Subject to the provisions hereafter noticed relating to the removal of cases from state to Federal courts, the Federal and state courts, in matters in which they have coördinate jurisdiction (as where the parties are citizens of different states, but the litigated question is one not involving Federal relations), concur in holding that the court which first obtains control of a suit by process duly issued is entitled to maintain control of such suit.[1] The same rule applies to criminal cases. Thus when a particular offence as an entirety is cognizable by two sovereigns, the first sovereign that takes possession of the defendant absorbs the case, and is entitled to pursue it to the end.[2] Where, also, property is in the possession of the sheriff or other ministerial officer of a state, it cannot be seized and taken possession of by a writ issued out of a Federal court, or the converse,[3] nor can property vested in a receiver be in this way seized.[4]

In questions of concurrent jurisdiction, tribunal that first takes control retains it.

be required to yield against our own judgment to the proposition, that under the charter of the railway company, the election in this case, which was held under the supervision of a moderator chosen by the electors present, was irregular and therefore void. But we are not bound to accept the inference drawn by the supreme court of Illinois, that in consequence of such irregularity in the election, the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of *bona fide* holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be. Swift *v.* Tyson, 16 Pet. 1; Russell *v.* Southard, 12 How. 139; Watson *v.* Tarpley, 18 How. 517; Butz *v.* Muscatine, 8 Wall. 575; Boyce *v.* Tabb, 18 Wall. 546; Oates *v.* Bank, 100 U. S. 239; Railroad Co. *v.* Bank, 102 U. S. 14. See, also, Burgess *v.* Seligman, decided at the present term, where the question how far the courts of the United States are bound by the decisions of the state courts is carefully re-examined, and the rule on the subject stated with precision." For Burgess *v.* Seligman, 107 U. S. 20; see *supra*, § 480.

[1] See Mallett *v.* Dexter, 1 Curt. 178; Diggs *v.* Wolcott, 4 Cranch, 424.

[2] *Supra*, § 351; Whart. Cr. Pl. & Pr., §§ 441–453; Coleman *v.* Tenn., 97 U. S. 309; Robinson, *ex parte*, 6 McLean, 355.

[3] Freeman *v.* Howe, 24 How. 450.

[4] Wiswall *v.* Sampson, 14 How. 52.

In The J. W. French, 13 Fed. Rep. 916, Hughes, D. J., said:—

"There are many cases in which it is held that when one court of general jurisdiction obtains jurisdiction of a controversy and custody of property

§ 528. The United States government, being sovereign, cannot, without its consent, be sued in its own courts, or in the courts of the states; though it has waived this privilege by the institution of the court

United States may be sued in the court of claims, but not otherwise.

which is the subject of that controversy, no other can take jurisdiction of either, especially of the property. This general principle is well settled. Taylor *v.* Carryl, 20 How. 583, is a leading case on this point. The same was held in Orton *v.* Smith, 18 How. 263; Hagan *v.* Lucas, 10 Pet. 400; The Ship Robert Fulton, 1 Paine, C. C. 620; The Oliver Jordan, 2 Curt. C. C. 414; Freeman *v.* Howe, 24 How. 450; Buck *v.* Colbath, 3 Wall. 334; and Windsor *v.* McVeigh, 93 U. S. 274; but it will be found in all these cases the custody of the officer first in possession of the property in controversy *was conceded to be lawful*. These cases are distinguished by that important fact from the case at bar, in which it is alleged that the sheriff's custody was unlawful, and therefore tortious.

"But even in cases where the first custody is lawful, it was held by Mr. Justice Miller, in Buck *v.* Colbath, speaking for the supreme court of the United States, that:—

"'The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in it, is subject to some limitation, and is confined to suits between the same parties or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility be involved in it.'

"And Mr. Justice Field, speaking for the supreme court of the United States, held, in Windsor *v.* McVeigh, that:—

"'The doctrine that when a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds after gaining jurisdiction of the cause according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it.'

"In this case the court said:—

"'All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil and criminal, or to particular modes of administering relief, such as legal or equitable, etc. Though the court may possess jurisdiction of a cause of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order the specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. . . . The judgments mentioned would not be merely erroneous—they would be absolutely void; because the court in rendering them would transcend the limits of its authority.'"

of claims, in which suits against it can be brought.[1] But in no case can the United States be sued in a state court.[2]

XXI. States as Parties.

Controversies between states include questions of boundary.

§ 530. The jurisdiction in controversies between states includes questions of contested boundary between states,[3] and also questions as to whether the conditions of dividing a state have been complied with.[4]

States must be the real parties to sue.

§ 531. It is not enough that a question between states may incidentally arise in a suit between individuals to bring such suit within the operation of the clause which gives the supreme court original jurisdiction of suits in which a state is plaintiff. A state, to give jurisdiction, must be the real plaintiff.[5] And, as will presently be seen, a state cannot by merely taking an assignment of a claim give the Federal courts jurisdiction of such claim.[6]

States can no longer be sued by individuals in Federal courts.

§ 532. In the original constitution the supreme court of the United States had jurisdiction in cases in which a state is defendant. This, however, was one of the points to which peculiar objection was taken, and by the eleventh amendment, which was adopted as part of the understanding on which New York and Virginia assented to the ratification, it is provided as follows: "The judicial power of the United States shall not be con-

[1] As to this court, see 1 Kent's Com., 297, note.

[2] Ableman *v.* Booth, 21 How. 506.

In U. S. *v.* Lee, 107 U. S. 189, it was held, that the exemption of the United States from suit is limited to suits against the United States directly and by name, and cannot be successfully pleaded in favor of officers and agents of the United States when sued by private persons for property in their possession as such officers and agents. It was further held, that in such cases a court of competent jurisdiction over the parties before it may inquire into the lawfulness of the possession of the United States as held by such officers or agents, and give judgment according to the result of that inquiry.

[3] Rhode Island *v.* Massachusetts, 12 Pet. 657; Alabama *v.* Georgia, 23 How. 505.

[4] Virginia *v.* West Virginia, 11 Wall. 39.

[5] Fowler *v.* Lindsey, 3 Dall. 411; see Governor *v.* Madrazo, 1 Pet. 110.

[6] *Infra*, § 532.

strued to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by the citizens or subjects of any foreign state." This provision, however, does not preclude the supreme court from taking cognizance, under other clauses already noticed, by way of review, of any cases in which a state is defendant, in which a decision is had against the validity of any Federal treaty, statute, or other official action.[1] Nor is jurisdiction, otherwise attaching, excluded by the fact that a state has a large interest in the case as defendant.[2] Nor can a state officer, acting without authority from the state, shield himself from liability on the ground that the state is virtually the party sued. On the other hand, the amendment cannot be evaded by making, when the object is to impose a liability on a state, state officials defendants. Nor can a citizen of another state, by assigning his claim to the state of which he is a citizen, under the authority of the legislature of the latter state, bring suit in the Federal courts against a state on which he has a claim. The amendment precludes all suits in law or equity against a state by citizens of another state; and this covers suits in which such citizens are the real parties, though the nominal parties may be states lending their names for the purposes of the suit.[3]

XXII. Habeas Corpus.

§ 534. The writ of *habeas corpus* in its general relations is discussed at large in another work, to which the student is referred.[4] It may be sufficient here to state that the power of judges of the Federal courts to issue writs of *habeas corpus* is limited to cases

Habeas corpus by Federal judges limited to

[1] Cohens *v.* Virginia, 6 Wheat. 264.

[2] Osborn *v.* Bank U. S., 9 Wheat. 738; Bank of Kentucky *v.* Wister, 2 Pet. 318.

[3] In New Hampshire *v.* Louisiana, Sup. Ct. U. S., 1883, it was held that one state cannot create a controversy with another state within the meaning of that term as used in the judicial clauses of the Federal constitution, by assuming the prosecution of debts owing by the latter state to the citizens of the former. That the agents of a state cannot be sued when representing the state, see Louisiana *v.* Jumel, *supra*, §§ 312, 493.

[4] Wh. Cr. Pl. and Pr., §§ 978 *et seq.*

cases involving Federal law.

where the petitioner is in custody under authority of the United States, or for an act done or omitted in pursuance of a law of the United States, or in the discharge of a duty to the United States, or in obedience to an order of a court thereof; or is charged with violation of the constitution or laws of the United States;[1] or is in prison for an act done by him as a subject of a foreign state;[2] or where the writ is issued for the purpose of obtaining the attendance of the party as a witness.[3] The writ, however, will be refused by a Federal court when the object is to review commitments under state penal process conflicting with no Federal law.[4] And the Federal courts, on *habeas corpus*, will not review the sentences of state courts acting *de facto*, but not *de jure*.[5]

[1] See Whart. Crim. Law, 8th ed., § 268; De Krafft *v.* Barney, 2 Black, 704; Tarble's Case, 13 Wall. 397; U. S. *v.* Jailor, 2 Abb. U. S. 265; Robinson, *ex parte*, 6 McLean, 355; McConologue, *in re*, 107 Mass. 154.

[2] As further cases of writs issued by Federal judges to release parties committed by state process, see U. S. *v.* Jailor, 2 Abb. U. S. 265; Farrand, *in re*, 1 Abb. U. S. 140; Electoral College, *ex parte*, 1 Hughes, 571; Whart. Cr. Pl. and Pr., §§ 981, 999. See, generally, on this subject, Field's Federal Courts, 304 *et seq.*; and see cases cited *supra*, § 524.

That a defendant will be discharged when under arrest by a state court for a homicide committed under Federal authority, see U. S. *v.* Jailor, 2 Abb. U. S. 265.

[3] Fugitive Slave Law, 1 Blatch. 635; Jenkins, *ex parte*, 2 Am. Law. Reg. (O. S.) 144; S. C., 2 Wall., Jr., 521, 539; Sifford, *ex parte*, 5 Am. Law Reg. (O. S.) 659; Brosnahan, *in re*, 18 Fed. Rep. 62.

[4] Dorr, *ex parte*, 3 How. 103.

[5] Chase, C. J., as reported in Griffin, *in re*, 25 Tex. (Sup.) 623; S. C., Chase Dec., 364.

That a prisoner detained under a state law conflicting with the Federal constitution may be discharged by a Federal court, see Wong Yung Quy, 6 Saw. 237; and see, also, as to unconstitutional liquor laws, Welton *v.* Missouri, 91 U. S. 282; *supra*, § 425.

On the question of the exclusiveness of Federal jurisdiction of crime, see *supra*, § 524.

In Brosnahan, *in re*, 18 Fed. Rep. 62, it was held that the circuit court of the United States may issue the writ of *habeas corpus* upon the application of any person who is imprisoned in violation of the constitution, or of any law or treaty of the United States; and if a person be imprisoned under a state statute which is in conflict with either, that court has power to discharge him. "The acts of congress concerning the writ of *habeas corpus*," said Miller, J., "have been brought together in chapter 13 of the Revised Statutes, and are included in sections 751–766. That which relates to the jurisdiction of the circuit courts is found in sections 751 and 753."

"Sec. 751. The supreme court and the circuit and district courts shall have power to issue writs of *habeas corpus*."

"Sec. 753. The writ of *habeas corpus*

§ 535. The writ of *habeas corpus* cannot be used by a state court for the purpose of revising arrests under Federal process.[1] Hence it is the duty of a Federal marshal, in whose custody may be a person arrested under Federal process, to refuse obedience to a writ of *habeas corpus* directed to him by a state court; and it will be a sufficient return by him to such a writ that he holds the prisoner by virtue of proper Federal authority, setting out what this authority is.[2] On the other hand, a Federal court, having power to issue a writ of *habeas corpus*, may discharge a person arrested in contravention of the constitution and laws of the United States.[3] When the detention, however, is by conviction in a state court, the proper mode of revision is writ of error,[4] though when the state court had not jurisdiction, then the writ of *habeas corpus* may issue from a Federal court, and under it the prisoner may be released.[5]

State court cannot discharge person under Federal arrest, but United States Court may on state arrest.

§ 536. It is not within the constitutional power of the president of the United States to suspend the

Power to suspend writ be-

shall in no case extend to a prisoner in jail, unless when he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of the law of the United States, or of an order, process, or decree of a court or judge thereof, *or is in custody in violation of the constitution, or of a law or treaty of the United States*, or being a subject or citizen of a foreign state," etc.

To this case is added a learned and elaborate note on the *habeas corpus* jurisdiction of the Federal courts.

[1] Tarble, *in re*, 13 Wall. 397. In a series of cases in state courts it has been held that the state court issuing the writ is to determine whether the Federal arrest is illegal. See Whart. Cr. Pl. & Pr., § 980, for authorities. But this would put in the state courts the power of ultimately reviewing the action of the Federal courts, and thereby destroying Federal supremacy, and introducing as many appellate courts as there are states. And in a note to McConnologue, *in re*, 107 Mass. 154, it is stated that in Massachusetts the supreme court now acquiesces in the rule laid down in Tarble's Case, denying the supervisory jurisdiction of the state courts. S. P., Davis, J., of N. Y. Supreme Court, in McDonnell's Case, 11 Blatch. 79.

[2] Tarble, *in re*, 13 Wall. 397; Robinson, *ex parte*, 6 McLean, 355.

[3] Whart Crim. Pl. & Pr., § 981.

[4] Ibid.

[5] Brown *v.* U. S., 14 Am. Law Reg. N. S. 566; Lange, *ex parte*, 18 Wall. 163, and cases cited *supra*, § 524.

longs exclusively to congress.

operation of the writ, or to authorize such suspension by a military officer. The prerogative of suspending the writ belongs exclusively to congress.[1]

[1] Merryman, *ex parte*, Taney, 246; McCall *v.* McDowell, 1 Abb. U. S. 212; Field, *ex parte*, 5 Blatch. C. C. 63; Griffin *v.* Wilcox, 21 Ind. 370; Kemp *v.* State, 16 Wis. 359; see, however, pamphlet by Mr. Binney, Phila., 1862, and other papers referred to in Whart. Cr. Pl. & Pr., § 979.

On this topic Judge Cooley (Const. Law, 1880, p. 289) thus speaks: "The privilege of the writ consists in this: that, when one complains that he is unlawfully imprisoned or deprived of his liberty, he shall be brought without delay before the proper court or magistrate for an examination into the cause of his detention, and shall be discharged if the detention is found to be unwarranted. The suspension of the privilege consists in taking away this right to an immediate hearing and discharge, and in authorizing arrests and detentions without regular process of law. Such suspension has been many times declared in Great Britain, or in some section of the British empire, within the present century; sometimes in view of threatened invasion, and sometimes when risings among the people had taken place or were feared, and when persons whose fidelity to the government was suspected, and whose influence for evil might be powerful, had as yet committed no overt act of which the law could take cognizance. It has been well said that the suspension of the *habeas corpus* is a suspension of Magna Charta (May, Const. Hist., ch. 11), and nothing but a great national emergency could justify or excuse it. The constitution limits it within narrower bounds than do the legislative precedents in Great Britain.

"The power to suspend this privilege is a legislative power, and the president cannot exercise it except as authorized by law. The suspension does not legalize what is done while it continues; it merely suspends for the time this particular remedy. All other remedies for illegal arrests remain, and may be pursued against the parties making or continuing them. It is customary, after the writ has been suspended in Great Britain, to pass acts of indemnity for the protection of those in authority, who, in the performance of their duties to the state, felt themselves warranted in arresting suspected persons while the suspension continued. Something similar has been done in this country by provisions in state constitutions; see Drehman *v.* Stifle, 8 Wall. 595; Hess *v.* Johnson, 3 W. Va. 645; but as a right of action arising under the principles of the common law is property as much as are tangible things, it is not believed the right could be destroyed by statute; Griffin *v.* Wilcox, 21 Ind. 370; Johnson *v.* Jones, 44 Ill. 142; see Milligan *v.* Hovey, 3 Biss. 1.

"Nothing in this provision hinders the states from suspending the privilege of this writ issuing from their own courts, and the declaration of martial law in the state has the effect of suspending it; Luther *v.* Borden, 7 How. 1."

XXIII. Reciprocal Rights.

§ 538. By the first section of the fourth article of the constitution, it is provided that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Numerous decisions have been made on the construction of this clause which have been elsewhere analyzed.[1] It is sufficient here to say, that in construing this and kindred clauses in the constitution it is important to keep in mind that the object of the provision was to secure between the states absolute freedom of intercourse. That which has been the beatific vision of publicists and political economists of the old world was to be brought into actual operation in the new world. Whatever might be the measures of encroachment, of exclusion, of non-intercourse, of distrust, of hostility between the several sovereignties of Europe, there was to be absolute freedom of trade and intercourse, and entire reciprocal official trust, between the sovereignties which were to occupy North America between the St. Lawrence and the Gulf of Mexico. We have already noticed the provisions precluding the states from forming foreign alliances or engaging in war, unless actually invaded, or imposing any tax, or toll, on whatever may cross from state to state. These are prohibitions touching the negative side of this freedom of intercourse. We now come to the affirmative side, involving commands to action; and the first of these to be noticed is the clause now before us. It is meant to put in an obligatory shape a rule of comity which in private international law sovereigns have felt themselves at liberty to expand or relax at discretion.[2] So far as concerns the terms in which this reciprocity is here imposed, the following distinctions may be noticed: (1) Judgments of sister states cannot be disputed collaterally.[3] (2) *Nil*

Public acts and records of each state entitled to be fully recognized in other states.

[1] See Whart. on Ev., §§ 808 *et seq.*

[2] Whart. Con. of Laws, §§ 646 *et seq.*

[3] Whart. on Ev., §§ 806–8.

debet cannot be pleaded to such judgments. The only plea is *nul tiel record.*[1] (3) Want of jurisdiction, however, may be set up to a suit on such a judgment,[2] and as indicating such want of jurisdiction, a defendant may aver by plea, that he was not an inhabitant of the state rendering the judgment, had not been served with process, and did not appear, or authorize an appearance.[3]

Question whether extra-territorial service is valid is still open.

§ 539. At a period when the practice of serving writs extra-territorially was rare and exceptional, the tendency of opinion was to the effect that a judgment obtained on such service was not internationally valid.[4] In jurisdictions, however, where this practice is adopted, it may be questioned whether such service can now be regarded as inoperative. And on principle there is no reason why service outside of a state should not be as good as service in such a state in all cases where the defendant is not thereby subjected to distinctive inconvenience.[5]

Citizens of each state to be entitled to immunities of citizens generally.

§ 540. By the first clause of the second section of article four "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The first question to be here determined is as to what citizenship means; and the answer is that the term is not to be so extended as to cover anything more than those general rights of asylum and of equality in the eye of the law which state citizenship, under a republican constitution, gives. Citizenship, also, is to be distinguished from domicil. A person who visits a state for only temporary purposes may be a citizen; but he is only domiciled in case his intent *is* to take up a permanent resi-

[1] Mills *v.* Duryea, 7 Cranch, 481; Christmas *v.* Russell, 5 Wall. 290, and other cases cited; Whart. Conf. of Laws, § 659.

[2] D'Arcy *v.* Ketchum, 11 How. 165; Knowles *v.* Gas Co., 19 Wall. 58; Hill *v.* Mandenhall, 21 Wall. 453; Folger *v.* Ins. Co., 99 Mass. 267, and other cases cited; Whart. Conf. of Laws, § 660; Bowler *v.* Huston, 30 Grat. 356.

[3] Whart. on Ev., § 796; Hall *v.* Lanning, 91 U. S. 160, and other cases cited; Whart. Conf. of Laws, § 660.

[4] See *supra*, §§ 283, 343, 344; Pennoyor *v.* Neff, 95 U. S. 714; Boswell *v.* Otis, 9 How. 336; Cooper *v.* Reynolds, 10 Wall. 308; see Harris *v.* Harris, 61 Ind. 117, and article in Virginia Law Journal, June, 1880.

[5] See *supra*, §§ 283, 344; Whart. Conf. of Laws, § 713.

dence.[1] The privileges of citizenship in a state entitle the citizen to all the immunities secured by the bill of rights. The privileges of domicil entitle the domiciled citizen of a state to have his *status* determined by the law of his domicil. But neither citizenship in a sister state, nor domicil in a sister state, entitles a person to exercise in another state privileges which are inconsistent with the special policy of the latter state.[2] On the other hand, any discrimination, by a state law, imposing special fines upon citizens of another state, are invalid.[3]

Fugitives from justice to be surrendered.

§ 541. It is further provided[4] that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." It is now settled that the term "crime" includes indictable offences of all grades. The words are "felony, or other crime." All crimes that are not felonies, must be misdemeanors. "Other crimes," therefore, must here include misdemeanors.[5] But the word crime does not include offences not strictly criminal; *e. g.*, bastardy.[6]

Must be "fleeing" from justice.

§ 542. In order to satisfy the conditions of the constitution, the party against whom the process is sought must have "fled" from the jurisdiction of the demanding state. If he was never in such state, he cannot be

[1] *Supra*, § 254.

[2] Whart. Conf. of Laws, § 104 *b*; *supra*, § 267.

[3] See *supra*, §§ 418 *et seq.*; *infra*, §§ 588, 594.

[4] Const., art. iv., § 2, cl. 2.

[5] Kentucky *v.* Dennison, 24 How. 66; Taylor *v.* Taintor, 16 Wall. 366.

[6] Cannon, *in re*, ~~Sup. Ct. Mich.~~ 1882. A misdemeanor punishable by a fine is within the purview of the constitution. Morton *v.* Skinner, 48 Ind. 123. Nor is there any difference in this respect between statutory and common law crimes. Hughes, *in re*, Phill. N. C. L. 57. "The word 'crime' in the clause of the constitution which has been quoted, embraces every act forbidden and made punishable by the law of the state, and the right of a state to demand the surrender of fugitives from justice extends to all classes of the violation of its criminal law. The obligation to surrender for an act which is made criminal by the law of the demanding state, but which is not criminal in the state upon which the demand is made, is the same as if the alleged act was a crime by the laws of both." People *v.* Brady, 56 N. Y. 182; see Clark, *in re*, 9 Wend. 212.

said to have "fled" from it; and this precludes extradition process for offences by an absent principal through an agent, or by a party operating through an extra-territorial mechanical agency.[1] But it is enough if the defendant was in the state at the time of the crime. His motives for leaving will not be inquired into.[2]

"Demand" must be based on *prima facie* judicial case of crime.

§ 543. The "demand," to justify a surrender, must be on a *prima facie* case; and this has been held to be adequately made out by an indictment, or by a complaint duly established by affidavit such as would sustain an arrest in a home procedure.[3] These papers are presented to the executive who is asked to issue a demand, and are attached by him to the demand.—They are not, however, so far as jurisdiction is concerned, conclusive, but may be inquired into in this respect by the executive of the asylum state, or by courts of such state on *habeas corpus*.[4] But while the papers are not conclusive as to jurisdiction, they cannot be impeached on their merits. If an offence is duly charged by a governor having jurisdiction, the truth of the charge (aside from the question of identity) cannot be gone into.[5]

[1] Jackson's Case, 12 Am. Law Rev. 602; Smith, *ex parte*, 3 McLean, 121; Greenough, *in re*, 31 Vt. 279; State *v.* Voorhees, *in re*, 3 Vroom (32 N. J. L.) 141; Jones *v.* Leonard, 50 Iowa, 106; and other cases cited Whart. Crim. Pl. & Pr., § 31.

[2] Voorhees, *in re*, 32 N. J. 141; U. S. *v.* O'Brien, 3 Dill. 381.

See Larney's Case, Chicago Legal News, March 11, 1882; Wilcox *v.* Nolze, 34 Oh. St. 520.

"It seems plain that a person arrested as a fugitive from justice who never had been corporeally in the demanding state [there have been such cases] would have a right to be heard on the legality of his extradition in the court of last resort before his delivery. As to him, it would be a case arising under the constitution and laws of the United States. It might be of vital importance; it might be worth his life. After delivery to the demanding state he could not successfully plead the illegality of his extradition in bar of the prosecution." Kerr, *ex parte*, Chicago Legal News, Sept. 29, 1883.

[3] Kingsbury's Case, 106 Mass. 223; People *v.* Brady, 56 N. Y. 182.

[4] Davis's Case, 122 Mass. 324; Voorhees, *in re*, 32 N. J. 141.

That affidavits, when taking the place of indictment, must be special and full, see Smith, *ex parte*, 3 McLean, 121; People *v.* Brady, 56 N. Y. 184; and other cases cited Whart. Crim. Pl. & Pr., § 29.

That defendant's identity must appear, see Whart. Cr. Pl. & Pr., § 35; Snyder, *ex parte*, 64 Mo. 58; State *v.* Swope, 72 Mo. 399.

[5] People *v.* Brady, 56 N. Y. 182.

"As the case before us is directly

§ 544. In some states by statute, in others by comity, arrest may be had in advance of a requisition. The prisoner is then kept a reasonable time to await the requisition and warrant.[1]

Arrest may be had in advance of requisition.

within the law of congress, our conclusion is that the indictment produced is sufficient evidence that the party is charged with a crime known to the laws of Georgia, and that no valid exception to the order of the governor exists on this ground." Briscoe, *in re*, 51 How. Pr. 422.

"But whether he is guilty or not, is not the question to be decided here. It is whether he has been properly charged with guilt, according to the constitution and act of congress. It is not necessary to be shown that such person is guilty; it is not necessary, as under the comity of nations, to examine into the facts alleged against him constituting the crime; it is sufficient that he is charged with committing the crime." Clark, *in re*, 9 Wend. 212.

"The warrant of the governor of the commonwealth is *prima facie* evidence at least, that all necessary legal prerequisites have been complied with, and if the previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the state from which he fled." Com. *v.* Hall, 9 Gray, 262; Kingsbury's Case, 106 Mass. 223; Brown's Case, 112 id. 409; Davis's Case, 122 Mass. 324.

[1] Hurd, Habeas Corpus, § 636; Ross, *ex parte*, 2 Bond, 252; and cases cited Whart. Cr. Pl. and Pr., § 29. As to lawfulness of arrest, see State *v.* Brewster, 7 Vt. 118; Miles, *in re*, 52 Vt. 609. See, generally, Spear on Extradition, for details of practice. And see §§ 317-324.

"That while the provision of the constitution referred to required that the fugitive should be surrendered upon the demand of the executive of the state in which the crime is charged to have been committed, it did not otherwise, or in the absence of the executive demand, undertake to define the duties or limit the authority of the state within which the fugitive from justice might be found. The constitution of the United States does not assume to deal with the question before the proper executive demand shall have been made, while upon the other hand the statute provides for the detention of the fugitive for a reasonable length of time in advance of and to afford an opportunity for the executive demand upon which the surrender is made. The paramount constitutional duty of the state to make the surrender upon proper executive demand, was in no wise in conflict with its reserved power to deal with the fugitive in the absence of such a demand." Cubreth, *in re*, 49 Cal. 436, Jan. 1875.

"I am of opinion, both upon principle and authority, that a fugitive from justice from either of the United States may, under the provisions of the constitution, be arrested and detained in this state preparatory to his surrender, before a requisition is actually made by the executive of the state where the crime was committed. It is an exercise of power essential to the full operation of the constitution, and has been sanctioned by a long and uniform course of practice." Per Cur. Fetter, *in re*, 3 Zabr. 311.

§ 545. It is no defence that the defendant is amenable to the asylum state, if no proceedings against him have been there commenced. If, however, there is a prosecution already begun in the asylum state, this takes precedence of the procedure instituted by the demanding state.[1]

No defence that defendant is amenable to asylum state.

§ 546. In international extradition, a fugitive should be privileged from prosecution while detained in the demanding state for any other charge than that on which he was surrendered. It is an abuse of justice, for instance, to obtain his surrender on one charge, and then try him on another of an entirely distinct class.[2] It is said to be otherwise, however, under the clause in the constitution before us; and it has been held that when a fugitive is transferred from state to state under its provisions, he is open in the latter state to any prosecutions which may be brought *bona fide* against him in such state.[3] But a court will not permit extradition process to be used oppressively so as to bring a party into the state under a charge made only to subject him to distinct process for which extradition would not be granted.[4]

Fugitive not privileged from any other than specified charge.

[1] Briscoe, *in re*, 51 How. Pr. 422; Taylor *v.* Taintor, 16 Wall. 366; S. C., 36 Conn., 242; Work *v.* Corrington, 34 Oh. St. 64; and other cases cited Whart. Cr. Pl. and Pr., § 33.

"By the constitution and laws of the United States the governor of Alabama had the right to demand Allen; and the governor of Tennessee had the power to give him up. Indeed, it would have been his imperative duty to have done so, if he had not rendered himself, by the commission of crime, amenable to our criminal laws. This would have justified the governor of Tennessee in detaining him till he had made satisfaction therefor." State *v.* Allen, 2 Humph. 258.

[2] Com. *v.* Hawes, 13 Bush, 697.

[3] Noyes, *in re*, 17 Alb. L. J. 407; Ham *v.* State, 4 Tex. Ap. 645; Sydam *v.* Senott, 20 Alb. L. J. 230, and other cases cited; Whart. Cr. Pl. Pr. § 37.

[4] Com. *v.* Hawes, 13 Bush, 697. In Cannon, *in re*, 47 Mich. 481, it was said by the court: "It was claimed on the argument here, that while that case may have been properly decided as applicable to extradition treaties with other nations, it had no bearing on extradition between states. We do not perceive any ground for the distinction. The duties of one state to another are measured by law, and not by their mere good pleasure; and so are the rights of citizens. The disregard of domestic duties and of foreign duties, should not be considered as different in quality, and where both depend on law it is impos-

§ 547. While it is the duty, under the constitution, of the executive of the asylum state to deliver fugitives when the demand is duly backed, yet it has been held that he cannot be compelled by *mandamus* from Federal courts to deliver.[1] Unquestionably there may be many grounds, in such cases, on which non-compliance may be urged. The object may be to enforce a private debt, or to subserve a political purpose; but the only ground on which the demand, if properly sustained by proof, ought to be refused, is that of the improbability of a fair trial being had if the fugitive be delivered. This ground, however, cannot be set up against a sister state under the guarantee of republican institutions given by the constitution. For a governor to refuse, when a case is properly made out, to surrender a fugitive, is as much nullification as for a governor to refuse to carry out any other duty imposed on him by the constitution.[2]

Governor of asylum state cannot be compelled by *mandamus* to act.

sible to find good reason for holding either class of obligations as undeserving of obedience."

In Slade *v.* Joseph, 5 Daly, 187, and Olery *v.* Brown, 51 How. N. Y. Pr. 92, it was held that a person indicted in New York, and brought to that state on extradition process, could be arrested in New York on civil process issued by persons who had not been instrumental in procuring his indictment or extradition.

[1] Kentucky *v.* Dennison, 24 How. 66; *supra*, § 378.

[2] See Whart. Crim. Pl. and Pr., § 34; Compton *v.* Wilder, 7 Am. Law Rec. 212. See, *contra*, Kimball's Case, 1878, in which the governor of Massachusetts refused to surrender on the grounds that the prosecution had not been prompt, and that the defendant had been asked to turn state's evidence. See Leary's Case, 6 Abbott, N. C. 445; People *v.* Pinkerton, 77 N. Y. 245; Carroll's Case, Chicago Leg. News, Sept. 28, 1878; Seymour's Case, 6 Am. Jur. 226; Hurd, Hab. Corp., 619.

In *Ex parte* Butler, 18 Alb. L. J., p. 369, it was held by the common pleas of Luzerne County, Pennsylvania, that a statute of Pennsylvania providing for an examination for the purpose only of identification of a fugitive from justice, whose rendition is demanded by the governor of another state, and for the issue of a writ of *habeas corpus* to secure such examination, is not invalid under art. 4, § 2, subd. 2, of the United States constitution. See discussion of this case in 18 Alb. Law J., 466 *et seq.*; and see 6 Am. Jurist, 226; Lawrence *v.* Brady, 56 N. Y. 182.

That a governor is bound on due cause shown to surrender, see Romaine, *in re*, 23 Cal. 582.

That the duty is obligatory, see, further, Taylor *v.* Taintor, 16 Wall. 370; Com. *v.* Green, 17 Mass. 515; *Re* Voorhees, 32 N. J. 141; *Re* Fetter, 3 Zab. 311; Johnston *v.* Riley, 13 Ga. 197; *Re* Briscoe, 51 Howard, Pr. 422;

XXIV. Guaranty of Republican Institutions.

§ 549. The fourth section of the fourth article of the constitution declares it to be a duty of the United States to

State *v.* Buzine, 4 Harring. 572; Work *v.* Carrington, 34 Ohio St. 64.

That the governor acts judicially, see *Re* Greenough, 31 Vermont, 279.

"Section 2 of article 4 of the constitution of the United States is a solemn compact between the states, to be enforced by state legislation or by judicial action; and, being a part of the supreme law of the land, it is a part of the law of each state; and state officers, whose duty it is to adjudicate or execute the laws, are governed by it; and state courts of general original jurisdiction, exercising the usual powers of common law courts, are fully competent to hear and determine all matters and issue all necessary writs for the arrest and transfer of fugitive criminals to the authorized agent of the state from which they fled, without any special legislation." Romaine, *in re*, 23 Cal. 585.

"Public policy, the security of society, and the regular and perfect dispensation of justice, as well as the established maxims of statutory construction, alike require that the term 'crime,' as thus used, should be held to comprehend every violation of the law which is of an indictable nature. It is the right of the sovereignty whose laws have been violated to decide what offences it will pursue, and the state upon which the demand is made cannot rightfully call in question that decision." Voorhees, *in re*, 3 Vroom, 141.

"When the governor of a state makes a requisition, under the constitution of the United States, on the governor of another state for the return of a fugitive from justice who has escaped from the former to the latter state, if the requisition is made with all the requisite formalities, it is his imperative duty to comply without inquiring whether the fugitive has committed a crime according to the laws of the state to which he has fled." Johnston *v.* Riley, 13 Ga. 97.

"This provision is in the nature of treaty stipulation between the states, and equally binding on each and all the officers thereof, even in the absence of congressional legislation." Hebler, *ex parte*, 43 Texas, 197.

Mr. Seward, when governor of New York, on the other hand, declared that "after due consideration, I am of the opinion that the provision applies only to those acts which, if committed within the jurisdiction of the state in which the person accused is found, would be treasonable, felonious, or criminal, by the laws of that state." Seward's Works, vol. ii. p. 452. Compare, however, Mr. Seward's action as Secretary of State in Arguelles's Case, Whart. Conf. of L., § 83.

"There can be no doubt, however, that if state governors were to defeat the operation of the law by a refusal to act under it, congress would be competent to provide for the arrest and delivery of fugitive criminals through the agency of Federal officers. The act of 1793 does not exhaust the possible remedies applicable to the case, on the assumption that the subject matter lies within the jurisdiction of congress; and if that act should fail, as it generally has not, then it would be in the discretion of congress to determine what other mode should be adopted to secure the end specified by the constitution." Voorhees, *in re*, 3 Vroom, 141.

"guarantee to every state in this Union a republican form of government." The language, it will be observed, is peculiar. The words are not "a republican government," which might imply that the Federal government could step in and control the domestic administration of state affairs so as to make them republican in motive and effect. It is "a republican *form* of government" that is required; and this is satisfied if the form of the government of a state makes the people, more or less directly, the source of power. The comments of the Federalist on this clause are striking. The words, it is said,[1] "presuppose a pre-existing government of the form that is guaranteed. As long, therefore, as the existing forms are continued by the states, they are guaranteed by the Federal constitution. Whenever the states may choose to substitute other republican forms they have a right to do so, and to claim the Federal guaranty for the latter. *The only restriction imposed on them is that they shall not exchange republican for anti-republican institutions.*" When we recall the variety of the constitutions of the states which composed the Union, we will see the force of these remarks. They agreed only in the acknowledgment of the general rule that executive and legislature should be elective, and that there should be no hereditary title to office, whether executive, judicial, or legislative. In other respects they differed. In some suffrage was given to all male inhabitants of full age. In others it was restricted by property tests; in others by educational tests. In some the governor was elected by the people; in others he was elected by the legislature; in some he had a veto, in others he had no veto. In some, voting was *viva voce;* in others it was by ballot. The legislature was in most states the fountain of power; but as to the mode of electing the legislature there was no agreement. Adjoining states followed totally distinct modes; in Massachusetts, for instance, the representatives were proportioned to the population of the towns; in Rhode Island there had been an arbitrary allotment made which resulted in a disparity of representation as

Guaranty does not extend to suffrage or to distribution of powers.

[1] Federalist, No. 43.

great as existed at the same time in England.[1] In some states the judges held office for life, and constituted a coördinate department of government, assuming to itself the right of determining the constitutionality of laws. In others they were elected by the legislature annually, and if they differed from the legislature, they made way for others more in sympathy with the legislative mind. It is plain, therefore, that the guaranty of "a republican form of government" does not mean a guaranty of any particular form in which a republican government might be framed.

Nor social equality.

§ 550. It is plain, also, that the guaranty does not extend to social equality. In the first place, where there is liberty there can be no equality, since the disparity in the capacity of men is such that if they should all start equal, in a few years some of them would own much more property than others, and some one of them would obtain an ascendency much more arbitrary and despotic than would exist in a state where the rights of property and of office are acknowledged and fenced in. In the second place, in the states, at the time they united in establishing the constitution, the grossest social disparity existed in the shape of slavery; and the constitution so far recognized this disparity as to provide for the surrender of fugitive slaves. And it is now settled that under the constitution as it stands, even after the incorporation of the fourteenth and fifteenth amendments, the adjustment of social rights is not within the range of congressional power.[2]

Nor to exemption from revolution.

§ 551. Nor does the guaranty extend to the perpetuation of the legitimate and regular succession of existing state governments. It could not have done this without denying its own title.[3] The constitution itself was adopted, as we have seen, by a sovereign act of the people of the several states, casting aside, for this purpose, the legitimate mode of amendment provided for by the articles of

[1] See on this topic Mr. Webster's argument on the Rhode Island government, 6 Webster's Works, 229, and opinion of supreme court of the United States in Luther v. Borden, 7 How. 1.

[2] *Infra*, §§ 586 *et seq.*

[3] *Supra*, § 368.

confederation. The new government instituted by the constitution was revolutionary, just as the prior confederacy was revolutionary. It was so with the states themselves; not one among them possessed at the time of the adoption of the constitution a government which was the legitimate successor of the prior provincial government. By every one of them not only had subjection to the British crown been cast aside, but the ties which bound the new system to the old had been more or less completely ruptured. The guaranty of the constitution is not, therefore, a guaranty of legitimacy of succession of the existing state governments. Nor has it ever been pretended that such succession was guaranteed. In numerous states, constitutions have been subsequently amended by calling conventions and submitting the result to the popular vote, though the old constitutions did not provide for this mode of amendment. In no one of these cases, however, has the authority of the *de facto* government, thus instituted, been questioned; nor has it ever been claimed that the Federal government could step in and prohibit this breach of legitimate succession.[1] It is true that it has been held that when there is an attempt to overthrow by force the legal government of a state when in the due exercise of its functions, the government of the United States, when called upon under the constitution to intervene, will be bound so to intervene; and that the judiciary will follow the executive in recognizing the continuing authority of such state government.[2] The recognition by the executive in such case, of the titular government, will bind all the departments of the United States government. But so does the recognition of a *de facto* government; and there is no state government that is not more or less remotely *de facto*.[3]

[1] *Supra*, § 369.

[2] See Luther *v.* Borden, 7 How. 1; Texas *v.* White, 7 Wall. 700; Gunn *v.* Barry, 15 Wall. 610.

[3] The "reconstruction" governments in several of the southern states were, it was maintained, retained in power for several years in antagonism to the votes of a majority of the people, by the action of returning boards. The inauguration of Governor Hampden, of South Carolina, in 1876, was in the teeth of the certificate of the returning board declaring his opponent to be elected; and so far as titular succession was concerned Governor Hampden's title was revolutionary. The president of the United States (Mr. Hayes), refused, however, to give the support of the Federal arms to Governor Chamberlain,

§ 552. When, however, the civil government of a state has been suspended, then congress may intervene, so it has been held, and construct for such state a republican government *de novo*. It is on this principle that what are called the reconstruction governments of the south, instituted, at the close of the late civil war, under the authority of congress, may be sustained. The only governments that were then existing in those states were provisional and military. This conflicted with the guaranty before us; and, under this guaranty, congress, so it was held, could constitutionally establish in the states in question constitutions which should be in their character republican.[1]

But may sustain reconstruction after civil government is suspended.

XXV. Religious Tests.

§ 553. By the third clause of the sixth article of the constitution it is provided that "no religious test shall ever be required as a qualification to any office or public trust under the United States;" and by the first amendment it is further provided that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As to these limitations the following points are to be observed: —

No religious test of office, nor establishment of religion permitted.

1st. They only relate to the Federal government; though similar provisions exist in the constitutions of most of the states.

2d. They do not preclude prosecutions for blasphemy, though this, in jurisdictions where these or similar provisions are in force, is, not because Christianity is an established religion, but because it is an indictable offence to insult any prevalent religious belief. And in all cases the right of freedom of argumentative discussion is reserved.[2]

who held the technical title, and this led to Governor Chamberlain's withdrawal and a consequent submission throughout the state to Governor Hampden. Governor Hampden was from that time recognized as governor of South Carolina by the Federal government, as well as by the courts and executives of other states when questions of extradition came up. See Appleton's Cyclo., 1877, p. 696.

[1] See *infra*, §§ 593–6.

[2] Whart. Crim. Law, 8th ed., § 1605.

3d. They do not vacate the rule that witnesses and public officers are to be sworn on the Bible, since to this rule the exception is universally admitted that the form of oath the party deems most binding is that by which he is to be sworn.

4th. They do not prevent the exemption of the property of religious societies from taxation.

5th. They do not render unconstitutional legislation prohibiting public labor on Sunday even by persons who conscientiously hold to another day as the Sabbath.[1]

6th. They do not preclude the prohibition by congress of polygamy in a territory by a majority of the population of which polygamy is regarded as a religious privilege. [2]

7th. They do not preclude the appointment of chaplains, and the proclamation of fast and thanksgiving days.[3]

XXVI. Freedom of Speech, of Petition, and of Bearing Arms.

§ 555. It is next provided that congress shall "make no law abridging the freedom of speech or of the press." This is to be regarded as merely an annunciation of a familiar common law rule that the right of speaking and publishing is one of the primary prerogatives of freedom. The same provision exists in the constitutions of most of the states, and has therefore been subject to frequent adjudication. It is agreed on all sides that it does not preclude suits for slander nor prosecutions for libel. The sedition law, passed during the administration of John Adams, was the basis of several prosecutions for libel, in which the constitutionality of this law was affirmed;[4] and although the impolicy of this law may be conceded, and

Freedom of speech not to be abridged.

[1] Whart. Crim. Law, 8th ed., § 1431*a*. Com. *v.* Hyneman, 101 Mass. 30; Com. *v.* Has, 122 Mass. 40; Specht *v.* Com., 8 Barr, 312; though see, *contra*, Cincinnati *v.* Rice, 15 Ohio, 225.

[2] U. S. *v.* Reynolds, 98 U. S. 145.

[3] That a school board may exclude the Bible as a devotional book in the public schools, see Board of Education *v.* Minor, 23 Oh. St. 211. That it may compel such reading, see Donahoe *v.* Richards, 38 Me. 376; Spiller *v.* Woburn, 12 Allen, 127.

The establishment of chaplaincies in army and navy has not been regarded as establishing any form of religion. The chaplains are officers in service, and are selected as a rule from no specific church.

[4] See reports in Whart. State Trials, 336 *et seq.*

it was ultimately repealed, no one now would doubt that it is within the power of the Federal government to enact laws making treasonable libels punishable. That this power exists in the states must be also conceded; and not only seditious libels, but libels on executive, on judiciary, and on legislature, federal or state, have been repeatedly held to be indictable.[1] But mere criticism, no matter how condemnatory, of the action of public men or of public bodies, is not, under a republican system properly subject to criminal prosecution. Not only is there no Federal statute now making such publications indictable, but such criticism is protected in almost all the states by constitutional prescription.[2] Nor is it likely that a Federal statute making such criticism indictable would be held constitutional in the Federal courts.[3]

Right of petition guaranteed

§ 556. By the remaining clause of the first amendment, it is declared that congress shall make no law abridging "the right of the people peaceably to assemble and to petition the government for a redress of grievances." This, also, is a prerogative of the people recognized in all liberal commonwealths. At the same time the prerogative does not protect the authors and publishers of a scandalous or seditious petition from prosecution.[4]

[1] Whart. Crim. Law, 8th ed., §§ 1611, *et seq.* Laws prohibiting publications as to lotteries do not conflict with the above guaranties; Hart *v.* People, 26 Hun, 396. Nor do laws prohibiting Federal officers from contributing or exacting money for political purposes. Curtis, *ex parte*, 106 U. S. 171.

[2] See Cooley, Const. Lim., 536–7.

[3] Ibid. See Resp. *v.* Dennie, 4 Yeates, 270, and cases in Whart. Crim. Law, 8th ed., §§ 1611 *et seq.*

Mr. Calhoun, in his report on the circulation of abolition petitions (Feb. 4, 1836, 5 Calhoun's Works, 190), took the ground that congress had no constitutional power to prohibit the transmission of documents through the mail.

That congress has power to prohibit the transmission of indecent matter through the mail, see U. S. *v.* Bott, 11 Blatch. 346; U. S. *v.* Heyward, Clifford, J., Cir. Ct. Mass., 1877; Bates *v.* U. S., 11 Biss. 70, and hence Rev. Stat., § 3893, is held constitutional. It was ruled by the U. S. Circuit Court in Louisiana, however, in January, 1884, that Rev. Stat., § 3894, prohibiting the transmission of letters concerning lotteries or gift concerns, and imposing a penalty on the sending of such letters, does not prevent the transmission and reception of such correspondence through the agency of a bank.

[4] See Whart. Com. Law, 8th ed., §§ 1636 *et seq.*; Benton's Thirty Years View, i. 135, ii. 32–36; U. S. *v.* Cruikshank, 92 U. S. 542, 552, Waite, C. J.

§ 557. The second amendment is as follows: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The last portion of this clause is to be qualified by the first. The right of all persons to keep and bear arms everywhere, and for all purposes is not affirmed; all that is affirmed is that the right of keeping and bearing arms in view of militia training and service shall not be infringed. Hence, statutes forbidding the bearing of concealed weapons have been held constitutional.[1]

Right to bear arms not to be infringed.

§ 558. The third amendment provides that "no soldier shall in time of piece be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law." On this limitation there have been no adjudications, nor has there ever been an occasion to require such adjudication. When, however, martial law is established, this limitation is suspended.[2]

Quartering soldiers forbidden.

XXVII. Unreasonable Searches and General Warrants.

§ 560. By the fourth amendment "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."[3] This clause bears the impress of the controversy as to general warrants which agitated England during the Grenville ministry, and which, to the colonists, had associated the claim of the British executive to issue general warrants with the claim to arbitrarily tax the colonies. The limitation above given is substantially a codification of Lord Camden's ruling

Unreasonable searches and general warrants forbidden.

[1] Wright *v.* Com., 77 Penn. St. 470; Andrews *v.* State, 3 Heisk. 165; State *v.* Clayton, 41 Tex. 410; Walls *v.* State, 7 Blackf. 572; Owan *v.* State, 31 Ala. 387; Wilson *v.* State, 33 Ark. 557, and other cases cited Whart. Crim. Law, 8th ed., § 1557; see *contra*, Bliss *v.* Com., 2 Litt. 90.

[2] See *supra*, § 37.

[3] See Rule of Court, *in re*, 3 Woods, 502.

to the effect that a general warrant, *i. e.*, a warrant which does not specify the person to be arrested, or the place to be searched, is illegal. What we have before us, therefore, is simply a recapitulation of the provisions of the common law in this relation;[1] and these provisions, as elsewhere discussed at large, are as follows:—

(1) A warrant omitting essentials is illegal.[2]

(2) Peace officers may arrest without warrant for offences in their presence, and for past felonies and breach of the peace, upon reasonable suspicion, which is convertible with probable cause.[3]

(3) A house may be broken open to execute warrants in cases of felonies or breaches of the peace.[4]

(4) Search warrants may be issued upon oath duly specifying person and thing,[5] but in opening trunks or drawers the key should be first demanded.[6]

XXVIII. Safeguards of Liberty and Property.

Grand jury requisite in felonies or "infamous" crime.

§ 561. By the fifth amendment "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." That the object of this amendment was to secure the interposition of a grand jury in all cases when prosecutions for crime are likely to impose serious and degrading consequences connot be questioned.[7] It has, however, been lately held that "infamous

[1] See State *v.* Spencer, 38 Me. 30; Allen *v.* Colby, 47 N. H. 544; Robinson *v.* Richardson, 13 Gray, 454, and other cases cited Whart. Cr. Pl. and Pr., § 26.

[2] Whart. Cr. Pl. and Pr., § 6.

[3] Ibid. § 8.

[4] Ibid. § 18.

[5] Ibid. § 22.

[6] Ibid. § 24; see Cooley, Const. Lim., 371–2.

The "search and seizure" clause in the liquor laws of some of the states have been held to conflict with the limitations in the text. Greene *v.* Briggs, 1 Curtis, 311; Fisher *v.* McGirr, 1 Gray, 1; State *v.* Snow, 3 R. I. 64; Hibbard *v.* People, 4 Mich. 126. As to how far telegraph companies are privileged from the production of their papers, see Whart. on Ev., § 595; Cooley, Const. Lim., 376.

[7] See Whart. Crim. Pl. and Pr., §§ 85–89.

crimes" are convertible with felonies.[1] But the better opinion is that all crimes which at common law would affix "infamy" of which the test is incapacitation as a witness, are infamous under this clause.[2] It should be added that this and the following limitation bear exclusively on the Federal government. A similar provision, however, is found in the constitution of most of the states.

No one shall be put twice in jeopardy for the same offence.

§ 562. "Nor shall any person," so the fifth amendment proceeds to declare, "be subject for the same offence to be twice put in jeopardy of life or limb." This limitation, also, is confined to cases arising in the Federal courts, and does not distinctively affect

[1] U. S. *v.* Field, *infra*, and cases cited *infra*; see King *v.* State, 17 Fla. 183.

[2] In U. S. *v.* Field, 16 Fed. Rep. 780, it was held that counterfeiting U. S. money is not an "infamous crime," and to the same effect are U. S. *v.* Coppersmith, 4 Fed. Rep. 198; and U. S. *v.* Yates, 6 Fed. Rep. 861; Wilson, *in re*, 18 Fed. Rep. 33. It is laid down in the last case following U. S. *v.* Block, 4 Sawy. 211, that "at common law a crime involving a charge of falsehood, must, to be infamous, not only involve a falsehood of such a nature and purpose as makes it probable that the party committing it is devoid of truth and insensible to the obligation of an oath, but the falsehood must be calculated to injuriously affect the public administration of justice. Tried by this test, the act of passing counterfeit coins with intent to defraud is, manifestly, not infamous." This statement is open to criticism. The common law test of infamy heretofore generally accepted is disqualification as a witness; in other words, an offence, a conviction of which disqualifies a person at common law as a witness, is infamous; an offence not working such disqualification at common law is not infamous. U. S. *v.* Mann, 1 Gall. C. C. 3; U. S. *v.* Isham, 17 Wall. 496; U. S. *v.* Buzzo, 18 Wall. 125; U. S. *v.* Ebert, 1 Cent. Law J. 205. As a general rule, "infamy," in this sense, comprehends treason, felony, and *crimen falsi* (Phil. & Am. Ev., 17; Co. Litt., 6 *b*; 1 Starkie, Ev., 94; 1 Greenl. Ev., §§ 372, 373; Whart. Crim. Ev., § 363); and it has been expressly held that a conviction of forgery works infamy, though forgery be only a misdemeanor. Rex *v.* Davis, 8 Mod. 54; Poage *v.* State, 3 Ohio St. 229. If this be the case with forgery, it is difficult to see why it should not be the case with the offence of passing counterfeit coin.

In U. S. *v.* Petit, 11 Fed. Rep. 58, the court was divided on the question stated in the text. Eminent as are the authorities sustaining an opposite view, it may nevertheless be maintained that the more reasonable course is to hold thatall offences a conviction of which imputes disgrace and brings a disgraceful punishment are "infamous." (See note to this effect, 16 Fed. Rep. 780, and observations of Judge Cooley, Princ. of Crim. Law, 29).

That the fifth amendment does not apply to cases in the army and navy service, see Mason, *ex parte*, 105 U. S. 696.

state procedure;[1] though provisions to the same effect exist in most state constitutions. Taking the words in their natural sense it is open to question whether they were meant to be anything more than an enunciation of the common law rule, that a person who has been once acquitted or convicted of an offence cannot (unless in cases where a conviction is set aside on his own motion) be put again on trial for such offence. But whether this is the true meaning of the words as above given has been the subject of animated and persistent controversy. In several states (*e. g.*, Pennsylvania, Virginia, North Carolina, Tennessee, and Alabama) it has been held that any dismissal of a jury, on the ground of inability to agree on a verdict, in capital cases, after the case is opened to them, unless there be physical necessity arising from danger to the life of one of the jurors, operates to discharge the defendant. In the courts of most of the remaining states, and in the United States courts, it is settled that the judge trying the case may discharge the jury whenever, in the exercise of a sound discretion, such discharge seems to him proper. It is agreed, however, on all sides that there is no jeopardy on a defective indictment, and that discharges are not bars when required by the sickness of the defendant or of the judge, or by the statutory close of the court. It is also agreed that to misdemeanors and to felonies, which were never capital, the limitation does not apply, and that the privilege is impliedly waived by a motion for a new trial. Whether it can be waived by an agreement at the time of the discharge is a question about which there has been also much difference of opinion, the courts which hold that there can be no discharge, except in case of physical necessity, generally holding that an agreement by the defendant that the jury shall be discharged does not afterwards bind him.[2] The more reasonable view is that, when the judge is satisfied that there is no prospect of an agreement, to compel the jury to remain together indefinitely, would either produce in one or more of them serious illness, or insure a victory

[1] Fox v. Ohio, 5 How. 410; U. S. v. Gibert, 2 Sumner, 19; Whart. Cr. Pl. and Pr., § 490.

[2] See authorities cited in Whart. Crim. Pl. and Pr., §§ 490 *et seq.*

of mere brute endurance in rendering the verdict, and that in such cases the jury should be discharged. On the other hand, there is strong sense in the position that a defendant on trial ought not to be asked to consent to a jury's discharge, and that his agreement to such a course should not be held binding. A man on trial for his life ought not to be forced to an election between offending the jury, on whom his fate depends, and consenting to what may expose him to a second and perhaps a fatal trial.[1]

Party cannot be compelled to testify against himself.

§ 563. A party, such is the next provision, shall not "be compelled to be a witness against himself." This, also, is a common law rule; it being a settled principle of that law, that a person, even when he offers himself as a witness, may decline to answer any questions, answers to which might be a link in a chain of crimination.[2] This is *à fortiori* the case with a party compulsorily examined as to a charge involving his own guilt. Under recent statutes, however, defendants in criminal cases may offer themselves as witnesses in their own behalf, and when they begin to narrate facts in respect to the offence with which they are charged, they cannot refuse to answer on cross-examination as to details, on the ground that this would criminate them. Waiving privilege as to part of a story waives it as to all.[3]

Life, liberty, or property, cannot be taken without due process of law.

§ 564. It is further provided, in the same article, that a party shall not "be deprived of life, liberty, or property, without due process of law." This limitation, which, in the fifth amendment, applies distinctively to the Federal government, is in the fourteenth amendment expressly applied to the states.[4]

[1] See, also, 17 Am. Law Reg., 735. The authorities on the distinctions taken in the text are given in full in Whart. Crim. Pl. and Prac., §§ 490 *et seq.*, 518, 735.

[2] Whart. Crim. Ev., 8th ed., § 463; Horstman *v.* Kaufman, 97 Penn. St. 147.

[3] Whart. Crim. Ev., 8th ed., § 432; *supra*, § 494.

[4] *Infra*, § 588. An indemnity statute has been held to preclude a witness from setting up the privilege under the Federal constitution: U. S. *v.* Brown, 1 Sawyer, 531. It is otherwise under the Massachusetts constitution; Emory's Case, 107 Mass. 172.

§ 565. This guaranty, however, does not confer relief from police restrictions;[1] and hence a statute providing that places of refreshment shall not be opened in the immediate vicinity of religious meetings is not unconstitutional. In the same line are to be noticed cases where police security or public health requires the removal or destruction of private property. In such cases, private interests must be subordinated to the public good.[2] Legislation prohibiting lotteries, agencies for sale of liquor, and structures affecting injuriously the health of the community, falls under the same head.[3]

This does not apply to police or health restrictions.

§ 566. It would render nugatory not only the clause immediately before us, but the similar clause in the fourteenth

[1] *Supra*, §§ 425, 486–7; see State *v.* Cate, 58 N. H. 43; Com. *v.* Bearse, 132 Mass. 542. As to "due process," see Sinking Fund Cases, 99 U. S. 700. As to nuisances, see *supra*, § 486; and as to police regulations generally, *supra*, § 425. In State *v.* Kartz, 13 R. I., 528, it was held that a statute providing that "every person who shall keep a place" in which it is reputed "that intoxicating liquors are sold" without a license, is unconstitutional. "Our attention," so said the court, "has been directed to certain decisions of the supreme court of Connecticut in which a similar statute of that state has been pronounced constitutional. State *v.* Thomas, 47 Conn. 546; State *v.* Morgan, 40 ib. 44; State *v.* Buckley, 40 ib. 246. The Connecticut statute, however, though essentially the same as ours in terms, has been construed to be different in meaning. The supreme court of Connecticut hold that the word 'reputed' means more than simply reputed, to wit, truly reputed, so that a person is not punishable for keeping a place which is reputed to be used for the illegal sale of intoxicating liquors, unless it is in fact so used. We do not think the statute so construed would be unconstitutional if carried out as construed, but in order to carry it out so, it would be incumbent on the government to charge the accused with keeping a place 'truly' reputed to be used for the sale of intoxicating liquors, and to prove in support of the charge both that the place was reputed to be so used and that it was so used in fact." As to statutes making evidence absolute, see *supra*, §§ 388, 494.

[2] Slaughter-house Cases, 16 Wall. 36; Beer Co. *v.* Mass., 97 U. S. 25; Stone *v.* Miss. 101 U. S. 814; Slaughter House Case, 9 Fed. Rep. 743; New Orleans Water Works *v.* St. Tammany, 14 Fed. Rep. 194; Com. *v.* Evans, 132 Mass. 11; Talbot *v.* Hudson, 16 Gray, 417; Taunton *v.* Taylor, 116 Mass. 254; Lake View *v.* Cemetery, 70 Ill. 191; State *v.* Wheeler, 44 N. J. L. 88; see Fox *v.* Cincinnati, 104 U. S. 783; see, also, *supra*, § 425.

[3] Whart. Crim. Law, 8th ed., §§ 1424, 1490, 1530; *supra*, §§ 426, 486.

amendment bearing on the states,[1] to say that the mere fact that a statute exists authorizing the taking of life, liberty, or property, is a justification of arbitrary action under such statute. The statute must be, not only constitutional, but consistent with common law rights.[2] Hence a statute authorizing the arbitrary seizure of property without judicial condemnation is unconstitutional.[3] But selling property for non-payment of taxes under statutory directions is not taking it without due process of law.[4]—Such are some

"Due process of law" means law which is constitutional and consistent with common law rights.

[1] See *infra*, §§ 588, 593, 594–6.

[2] Story on Const., 4th ed., §§ 1943–6; Cooley, Const. Lim., ch. 8; Bank of Columbia *v.* Okely, 4 Wheat. 235; Davidson *v.* New Orleans, 96 U. S. 97; Burt *v.* Brigham, 117 Mass. 307; Burke *v.* Savings Bank, 12 R. I. 513; Hubbard *v.* Brainard, 35 Conn. 563; Taylor *v.* Porter, 4 Hill, N. Y. 140; Granger *v.* Buffalo, 6 Abb. (N. Y.) N. C. 238; Clark *v.* Mitchell, 69 Mo. 627; Assessment Board *v.* Alabama R. R., 59 Ala. 551; Campau *v.* Langley, 39 Mich. 451; Daniel *v.* Richmond, 78 Ky. 542; Brady *v.* King, 53 Cal. 44; Harper *v.* Rowe, 53 Cal. 233. As to construction of statute in such cases, see *infra*, § 609.

That a town ordinance authorizing the seizure and sale, without notice, of hogs running at large, is unconstitutional, see Varden *v.* Mount, 78 Ky. 86.

That change of procedure does not violate "due process of law," see U. S. *v.* Union Pacific Co., 98 U. S. 569; De Treville *v.* Smalls, 98 U. S. 517; *supra*, § 492.

[3] Lowry *v.* Rainwater, 70 Mo. 152; Detroit *v.* Plank Road Co., 43 Mich. 140; see the J. W. French, 13 Fed. Rep. 916; Rutherford *v.* Maynes, 97 Penn. St. 78.

That the limitation applies as well to executive as to judicial proceedings, see Stuart *v.* Palmer, 74 N. Y. 183. That it applies to constitutional conventions, see Clark *v.* Mitchell, 69 Mo. 627; *infra*, § 588.

[4] Springer *v.* U. S., 102 U. S. 586; Kelly *v.* Pittsburgh, 104 U. S. 78.

As to meaning of "due process of law" in connection with infliction of punishment, see Milligan's Case, 4 Wall. 2; quoted *infra*, § 580; Gross *v.* Rice, 71 Me. 24; People *v.* Webb, 16 Hun, 42; State *v.* Anderson, 40 N. J. L. 224; Blackman *v.* Halves, 72 Ind. 515; Walker *v.* State, 35 Ark. 386; and see further, *infra*, §§ 580, 588.

That the right of jury trial in civil issues may be abridged, see Chase *v.* Jefts, 58 N. H. 43; Foster *v.* Morse, 132 Mass. 354; *infra*, § 581.

"It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession, on account of acts for which he may be indicted and tried by a jury, is in violation of the fifth amendment of the constitution, which forbids the depriving of any person of life, liberty, or property without due process of law. But the action of the court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practised from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of

of the distinctions taken as to the term "due process of law," in its general relations. The meaning of the term as specifically

the constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. That it embraces many cases in which the offence is indictable is established by an overwhelming weight of authority. This being so, the question whether a particular class of cases of misconduct is within its scope cannot involve any constitutional principle.

"It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of *habeas corpus*, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases, that kind of procedure is due process of law, which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."' (Cooley's Const. Lim., 353.)

"The question what constitutes due process of law within the meaning of the constitution was much considered by this court in the case of Davidson *v.* New Orleans, 96 U. S. 97; and Mr. Justice Miller, speaking for the court, said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.'"

Bradley J., Wall, *ex parte*, 107 U. S. 265.

In Quimby *v.* Hazen, 54 Vt. 132, we have the following by Powers, J.:—

"Says Story, J., in Wilkinson *v.* Leland, 2 Peters, 627: 'We know of no case in which a legislative act to transfer the property of A. to B. without his consent has ever been held a constitutional exercise of legislative power in any state of the Union.' And Curtis, J., in Webster *v.* Cooper, 14 How. 488, speaking of that clause in the constitution of the state of Maine which secures to every citizen the right of 'acquiring, possessing, and enjoying property' (which is substantially the phraseology of article I. of our bill of rights), says: 'That, by the true intent and meaning of this section, property cannot, by a mere act of the legislature, be taken from

used in the fourteenth amendment will be hereafter distinctively considered.[1]

Private statutes quieting title not unconstitutional.

§ 567. Private statutes, however, removing, for the benefit of all parties, clouds on title, are not unconstitutional when there is no other way of disentangling knots which the courts cannot loosen, or of making settlements in which all parties acquiesce, but which no court could make in consequence of the incapacity of a party.[2] This prerogative may be exercised when the necessary transmission of property is clogged by the incapacity of parties who will be seriously injured unless there be legislative interposition.[3] Mere informalities, also, in judicial proceedings may be corrected by the action of the legislature. This has been held to be the case with informalities in sales by executors and trustees,[4] and with irregularities in partition deeds,[5] and with other analogous defects.[6] And an act authorizing the guardian of minor children to convey real estate has been held within the constitutional power of the legislature.[7] But the legislature has no power to direct the

man and vested in another directly; nor can it, by the retrospective operation of law, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce that effect.' And the supreme court of Michigan, in Ames *v.* Port Huron Log Driving Co., 11 Mich. 147, says: 'It is an inflexible principle of constitutional right, that no person can legally be divested of his property without remuneration, or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and facts.'"

That "due process of law" involves a right to notice and reasonable opportunity to be heard, see Whart. on Ev., §§ 796, 893; Windsor *v.* McVeigh, 93 U. S. 274; Davidson *v.* New Orleans, 96 U. S. 97; Overing *v.* Foote, 65 N. Y. 263; Philadelphia *v.* Miller, 49 Penn. St. 440; Gilmore *v.* Sapp, 100 Ill. 297; Butler *v.* Saginaw, 26 Mich. 22.

[1] *Infra*, § 588.

[2] Savings Bank *v.* Allen, 28 Conn. 97; Journeay *v.* Gibson, 56 Penn. St. 57; Jones's App., 57 Penn. St. 369; see *supra*, § 492, as to modifying remedies.

[3] Todd *v.* Flournoy, 56 Ala. 99; Tindal *v.* Drake, 60 Ala. 170.

[4] Lucas *v.* Tucker, 17 Ind. 41; see *infra*, § 568; *supra*, §§ 475, 492.

[5] Kearney *v.* Taylor, 15 How. 494.

[6] See, also, Wade on Retroactive Laws, §§ 250-7.

[7] Estep *v.* Hutchman, 14 S. & R. 435; Kerr *v.* Kitchen, 17 Penn. St. 433.

sale of the real estate of one *sui juris*.[1] In submission to the same general rule a state statute authorizing commissioners to sell lands held by devisees in tail, so as to bar the entail and effect a partition, the relief being applied for by the executors of the will and the mother of the devisees, was held, in Ohio, constitutional.[2] This class of legislation, Judge Cooley declares, "may, perhaps, be properly called prerogative remedial legislation. It hears and determines no rights; it deprives no one of his property. It simply authorizes one's real estate to be turned into personal, on the application of the person representing his interest; and under such circumstances that the consent of the owner, if capable of giving it, would be presumed."[3] In the latter incident the provision before us differs

[1] Kneass's Est., 31 Penn. St. 87.

That a retrospective state law is unconstitutional when conflicting with a provision in a state constitution prohibiting such legislation, see Forster *v.* Forster, 129 Mass. 559; Goshorn *v.* Purcell, 11 Oh. St. 641; Drew *v.* R. R., 81* Penn. St. 46; see Rich *v.* Flanders, 39 N. H. 304; *supra*, § 475.

That a retrospective act is not *per se* unconstitutional, see Wade on Retroactive Laws, §§ 156 *et seq.*; Balt. & Susq. R. R. *v.* Nesbit, 10 How. 395; Drehman *v.* Stifle, 8 Wall. 595; Brown *v.* N. Y., 63 N. Y. 239; State *v.* Newark, 27 N. J. L. 185; *supra*, §§ 472 *et seq.*

That irregularities in assessments can be thus cured, see Schenley *v.* Com., 36 Penn. St. 29.

That a deed made to the wrong person may be thus corrected, see Kearney *v.* Taylor, 15 How. 494.

That an imperfect acknowledgment can be thus cured, see Goshorn *v.* Purcell, 11 Ohio St. 641.

That the legislature, however, cannot in this way revise judicial decisions, see *supra*, §§ 388 *et seq.*; and see Denny *v.* Mattoon, 2 Allen, 361.

Judge Cooley (Const. Lim., 4th ed., 98) states as follows the law in respect to sale of minors' estates under special statutes: "If the party standing in the position of trustee applies for permission to convert by a sale the real property into personal, in order to effectuate the purposes of the trust, and to accomplish objects in the interest of the *cestui que trust* not otherwise attainable, there is nothing in granting the permission which is in its nature judicial. To grant permission is merely to enlarge the sphere of the judicial authority, the better to accomplish the purpose for which the trusteeship exists." To this is cited Rice *v.* Parkman, 16 Mass. 326; Cochran *v.* Van Surlay, 20 Wend. 365; and see Suydam *v.* Williamson, 24 How. 427; Post, *in re*, 13 R. I. 495.

[2] Carroll *v.* Olmsted, 16 Ohio, 251.

[3] Cooley, Const. Lim., 4th ed., 125.

As to retroactive modification of evidence, see *supra*, §§ 494, 563.

The question of retrospective remedial acts is discussed in Buckalew on the Constitution of Pennsylvania, 99 *et seq.* In the debate in the Pennsylvania Constitutional Convention of 1873, where this power was reserved to the legislature under certain limitations,

fundamentally from recent British statutes for the sale of encumbered estates, and for other purpose of land settlement. With us title cannot be divested unless with the owner's assent, or, if he is incapable of giving such assent, unless there exist circumstances by which his assent, if he were capable of giving it, would in all probability have been induced. No such restriction is recognized as binding the British Parliament, which has the power to divest title at its discretion. There is no question that this power, exercised in the divesting of the title of ecclesiastical corporations without their consent, has greatly conduced to English prosperity. On the other hand, there is little doubt that when property becomes settled in private hands, under a system which discountenances undue accumulation in mortmain, it is better for the country that limitations such as that before us should be scrupulously maintained. They are not arbitrary, but emanate from a craving on the part of the people for stability of title and stability of rights.

it was urged by Judge Woodward, a jurist of long experience and eminent ability, that the legislative power of curing merely formal defects in titles is essential to public justice. "In point of fact, cases of sporadic individual hardship would occur which could not be anticipated. We did not know when they would arise, and that was the reason why power to relieve them must reside somewhere in the state, if they meant the people should be a free people." 2 Conv. Deb., 610.

In Satterlee *v.* Mathewson (16 S. & R. 169, aff. 2 Pet. 380) it was held that a statute was constitutional which was passed to validate certain leases of land which the local courts had ruled to be invalid. See, also, Foster *v.* Essex Bank, 16 Mass. 245.

That statutes validating conveyances of married women are not unconstitutional, see Watson *v.* Mercer, 8 Pet. 88; Underwood *v.* Lilly, 10 S. & R. 97; Goshorn *v.* Purcell, 11 Ohio St. 641; Dentzel *v.* Waldie, 30 Cal. 138.

That the legislature cannot generally assume judicial functions, see *supra*, § 388.

In Post, *in re*, 13 R. I. 495, it was held that an act of the general assembly, in 1844, authorizing a conversion into personalty of real estate in the then town of Newport, was valid, as it may have appeared, after inquiry and consideration, that the value of realty, so situated, had reached its culmination and was liable to decline. The court cited Clarke *v.* Van Surlay, 15 Wend. 436; Cochran *v.* Van Surlay, 20 id. 365; Rice *v.* Parkman, 16 Mass. 326; Sohier *v.* Mass. Gen Hospital, 3 Cush. 483; Clarke *v.* Hayes, 9 Gray, 426; Carroll *v.* Olmsted, 16 Ohio, 251; Todd *v.* Flournoy's Heirs, 58 Ala. 99; Blagge *v.* Miles, 1 Story, 426; Bambaugh *v.* Bambaugh, 11 Serg. & R. 191; Thurston *v.* Thurston, 6 R. I. 296.

§ 568. An interesting distinction has been taken with regard to the curing by legislation of defects arising from incapacity. When such incapacity is merely formal and technical, defects caused by it may be cured by special legislation. This has been held to be the case with statutes validating notes tainted with usury,[1] and notes issued by a corporation whose charter did not give it power to issue notes;[2] with conveyances by married women;[3] even with a marriage defective in formal execution.[4] On the other hand, the deed of an insane person cannot be validated by legislation.[5] And, as we have already seen, legislation reviewing judicial proceedings is unconstitutional.[6] Legislation, also, curing defects, is not operative so as to prejudice *bona fide* purchasers for a valuable consideration, nor to divest rights vested in heirs.[7]

Defects of formal incapacity may be corrected by legislation; not of actual incapacity.

§ 569. The last clause of the amendment now before us, is that "private property" shall not be "taken for public use without just compensation." This, like the other clauses in this amendment, is binding only on the Federal government. The same provision, however, is introduced into the constitutions of most of the states. It is, like the clauses immediately before it, a principle common to all constitutional governments. In the same general sense is to be accepted the clause just noticed, as supplemented in the fourteenth amendment: "nor shall any state deprive any person of life, liberty, or property without due process of law." But be this as it may, there is no jurisdiction in the United States in which by stress either of Federal or state legislation private property can be taken for public use without compensation.[8]

Private property cannot be taken without compensation.

§ 570. The prohibition of "taking" of private property is

[1] Savings Bank *v.* Allen, 28 Conn. 97; Parmelee *v.* Lawrence, 48 Ill. 331.

[2] Trustees *v.* McCaughy, 2 Ohio St. 152.

[3] *Supra*, § 567.

[4] Goshen *v.* Stonington, 4 Conn. 209.

[5] Routsong *v.* Wolf, 35 Mo. 174; see Cooley, Int. to Const. Law, 325.

[6] *Supra*, §§ 388 *et seq.*

[7] Les Bois *v.* Bramel, 4 How. 449; Shonk *v.* Brown, 61 Penn. St. 320; Hillyard *v.* Miller, 10 Penn. St. 326; Alter's App., 67 Penn. St. 341; State *v.* Warren, 28 Md. 338.

[8] Mobile Co. *v.* Kimball, 102 U. S. 691; Kennedy *v.* Indianapolis, 103 U. S. 599; Sweet *v.* R. R., 79 N. Y. 293; Maxwell *v.* Goetschius, 40 N. J. L.

not to be limited to the "taking" or appropriation of movable property.[1] Nor is it any answer that the property was taken by the government. The government acting directly is as much bound by the restriction before us, as is the government acting indirectly through individuals.[2]

Rule applies to real estate.

§ 571. Property, however, must be vested to place it within the shelter of this limitation. A mere expectancy is not thus protected.[3]—On the other hand, "the legislature cannot, by an arbitrary edict, take the property of one man and give it to another."[4] A statute, for instance, legitimating children is not unconstitutional so far as concerns a parent's estate, if enacted during the parent's life; and laws of inheritance may be changed by the legislature so as to affect the title of parties holding only

Property must be vested.

383; Bachler's App., 90 Penn. St. 207; Chicago *v.* Rumsey, 87 Ill. 348; Johnson *v.* Parkersburg, 16 W. Va. 402; Milwaukee Supervisors *v.* Pabst, 45 Wis. 311; Oakland Co. *v.* Rier, 52 Cal. 270.

"The obligation to make compensation for property taken for the public use, under the right of eminent domain, is generally regarded as a necessary condition of the exercise of the right, even at common law. Cooley, Const. Lim., 559. And it is made imperatively so by the fifth amendment to the constitution, which, among other things, declares: 'Nor shall private property be taken for public use without just compensation.' This constitutional protection of the rights of the individual against the public is to be enforced by the court, whenever any department of the government undertakes to act in disregard of it, as the occasion may require." U. S. *v.* Lee, 106 U. S. 196, 220; S. P., U. S. *v.* Oregon Nav. Co., 16 Fed. Rep. 524; see Sage *v.* Brooklyn, 89 N. Y. 36; Austin *v.* R. R., U. S. Cirt. Ct. Vt., 1883, 16 Rep. 548.

[1] In Pumpelly *v.* Green Bay Co., 13 Wall. 166, it was held that property need not be actually taken in the strict sense of the term, but that it is sufficient if there is a serious interruption of the use of such property. See Story *v.* R. R., 90 N. Y. 122. How far the famous case of Munn *v.* Illinois, 94 U. S. 113, militates against the constitutional guaranty now before us, has been already discussed, *supra*, § 490. The question is examined by Mr. Pomeroy, in 17 Am. Law Rev., pp. 110 *et seq.* It should be remembered that the right to hold property free from any interference on the part of the state, except through due process of law, is one of the rights pronounced by the Declaration of Independence to be absolute and inalienable. The inference is, that any constitutional limitation invading this right is to be construed strictly in favor of the people and against the government; *infra*, § 609.

[2] U. S. *v.* Lee, 106 U. S. 196, cited *infra*, § 574.

[3] Wade on Retroactive Laws, § 157; Cooley, Const. Lim., 4th ed., 438 *et seq.*; Bank of Columbia *v.* Okely, 4 Wheat. 235.

[4] Paxson, J., Lane *v.* Nelson, 79 Penn. St. 407.

in expectancy. But such laws are inoperative for the purpose of divesting rights accrued by the ancestor's death.[1]

Sovereign has a right to eminent domain.

§ 572. When the property of one person is taken by the sovereign for the benefit of another, the implication is that the former is to recover the value of the property from the latter.[2] When property, also, is taken for public use, by the right of eminent domain, this is subject to a constitutional check as to compensation from the sovereign. "Eminent domain," therefore, in the sense in which the term is used in this relation, is the right of a sovereign to appropriate private property for public purposes when required by public need, proper compensation being made therefor. In the states, the right of eminent domain resides in the state itself, as represented by its specific government. The United States cannot interfere with the exercise of this right; though the supreme court of the United States, when it has, for other reasons, jurisdiction of such cases, does not lose this jurisdiction from the fact that the state's right of eminent domain is involved.[3] In the territories the right belongs to the United States government,[4] though it may be exercised for local purposes by the territorial legislature. As soon as the territory is admitted as a state into the Union, its right of eminent domain over its soil becomes absolute in all state relations.[5]

United States government may exercise the right for Federal purposes.

§ 573. For Federal purposes the United States government, may exercise the right, in cases in which the state declines to cede, and individuals voluntarily to sell.[6] The right, however, rests on necessity; it must be exercised in subordination to legislative authority; the taking must be limited to the necessity; and adequate compensation should be given.[7]

[1] Norman v. Heist, 5 W. & S. 171; Gallbraith v. Com., 14 Penn. St. 258; Gregley v. Jackson, 38 Ark. 487.

[2] Hersch v. U. S., 15 H. & N. 385; Hackett v. Ottawa, 99 U. S. 86; see Union Pac. R. R. v. Atchison R. R., 26 Kans. 669.

[3] Boom Co. v. Patterson, 98 U. S. 403.

[4] See *supra*, § 462.

[5] Weber v. Harbor Commis., 18 Wall. 57.

[6] Kohl v. U. S., 91 U. S. 367.

[7] Cooley, Const. Lim., 4th ed., pp. 953 *et seq.*, and cases there cited. In U. S. v. Lee, 106 U. S. 196, where the appropriation of the Lee estate of Arlington for cemetery purposes

§ 574. The appropriation must be ordinarily for public use, and only as much as is necessary for such purpose.[1] A consequential benefit to the community is enough to sustain the opening of a road through private property; but this benefit must be of a character definite and appreciable.[2] It is on this ground, so it is said, that land may be taken to promote the drainage of a particular neighborhood, and thus to improve the health and comfort of a community.[3] And, as has been seen,[4] property may be taken when necessary for police security or general health and comfort.

Must be for public use.

§ 575. The right extends to corporate franchises, so that the bridge of a corporation can be taken for public use and made a free bridge.[5] Franchises of all kinds may be thus taken when needed for the public good.[6]

Franchises may be thus taken.

§ 576. The right of appropriation, however, cannot (unless in cases of necessity, as where required by the exigencies of war or of some great public disaster[7]) be exercised arbitrarily.

was held invalid under the clause before us, it was said by Miller, J., giving the opinion of the court: "It is not pretended, as the case now stands, that the president has any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation."

[1] Sixth Avenue R. R. *v.* Kerr, 72 N. Y. 330.

[2] Mills, Eminent Domain, §§ 287–8, citing Harvey *v.* Thomas, 10 Watts, 63; see Mobile Co. *v.* Kimball, 102 U. S. 691.

[3] Talbot *v.* Hudson, 16 Gray, 417.

[4] *Supra*, §§ 125, 486–7, 565.

It has been also held not unconstitutional to impose on one county the burden of an improvement in which the whole state is interested. Mobile Co. *v.* Kimball, 102 U. S. 691.

[5] Towanda Bridge Co., *in re*, 91 Penn. St. 216.

[6] Richmond R. R. *v.* Louisa R. R., 13 How. 71; Backus *v.* Lebanon, 11 N. H. 19; Hand Gold Co. *v.* Parker, 59 Ga. 419; see Wade on Retroactive Laws, § 72.

[7] That in such case the danger must be immediate and urgent, see Mitchell *v.* Harmony, 13 How. 115.

Exercise of right must be by general law, except in cases of necessity.

It must be in obedience to general law, after suitable investigation and trial; and in this sense, as we have seen, is to be understood the clause in the fourteenth amendment, already cited, "nor shall any state deprive any person of life, liberty, or property, without due process of law." Legislation to this effect is in exercise of a high prerogative of sovereignty, and must be strictly construed.[1] Necessity, to be recognized as an exception to this rule, must be urgent and immediate, permitting no other relief. This has been held to be the case with the seizure by the municipal authorities of the intoxicating liquor in a city to prevent it being seized and used by an invader,[2] and the destruction of a building in order to arrest a conflagration.[3] Under this head may be included the abatement of nuisances, when such abatement is necessary to public health and comfort.[4]

Power may be delegated.

§ 577. Private corporations, such as railroads, created for public convenience, may be endowed by the state with the power of taking land for their corporate purpose, they paying, in conformity with law, due compensation therefor.[5] Objectionable as on principle may be this delegation, "it is now too well settled to admit of any question, although the power is plainly liable to abuse."[6] The delegation, however, is to be strictly construed.[7]

Compensation must be fairly adjusted.

§ 578. The better opinion is that at common law, as well as under the limitation in the fourteenth amendment, a state taking private property is bound to provide a fair tribunal for the assessment of compensation, the contestant having every opportunity allowed him of showing what damage he has received.[8]

[1] Burt *v.* Brigham, 117 Mass. 307.

[2] Jones *v.* Richmond, 18 Grat. 517.

[3] Saltpetre Case, 12 Coke, 12; New York *v.* Lord, 18 Wend. 126; Russell *v.* Mayor, 2 Denio, 461; Hale *v.* Lawrence, 1 Zab. 714; Philadelphia *v.* Scott, 81 Penn. St. 80; and other cases cited Cooley's Const. Lim., 4th ed., 747.

[4] *Supra*, §§ 425, 486, 565; Whart. Crim. Law, 8th ed., § 1426.

[5] Secombe *v.* R. R., 23 Wal. 108; Cape Girardeau Co. *v.* Dennis, 67 Mo. 438.

[6] Pomeroy, Const. Law, 161.

[7] Redman *v.* R. R., 33 N. J. Eq. 165.

[8] Co. Lit. s. 212; Dimes *v.* Proprietors, 3 House of L. Ca. 759; Boom Co. *v.* Patterson, 98 U. S. 403; Rich *v.* Chicago, 59 Ill. 286, cited Cooley's

Hence it has been held in New York that a law authorizing the taking of land without a public official pledge for payment, remitting the owner to a future contingent fund, is unconstitutional.[1]

Defendant entitled to an impartial jury of place of crime; to be informed of the nature of the charge, to have compulsory process for witnesses, and to have counsel.

§ 579. By the sixth amendment, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime was committed, . . . and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defence." These provisions are also familiar common law rules, introduced in this place to guard against any usurpation on the part of the Federal government. The limitations as to speed and publicity and impartiality need no comment. That which provides that the trial shall be by a jury "of the state and district wherein the crime was committed," has been subject to two opposite interpretations. On the one side, it is maintained that the place of the jurisdiction of a crime is the place in which the accused was at the time of the crime. On the other side it is urged that this is a *petitio principii*, since it assumes the guilt of the accused, which is the very question at issue; and that the true view, both on principle and on technical interpretation, is that the place where the crime was committed, *i. e.*, that whose sovereignty was invaded by the act, and in which the crime took effect, is the place of jurisdiction.[2]—The other clauses in this amendment require in this place no further discussion, being common law rules universally recognized.[3]

Princ. Const. Law, 341; see Wynehamer *v.* People, 3 Kern. 378; South Park Com. *v.* Dunlevy, 91 Ill. 49.

[1] Sage *v.* Brooklyn, 89 N. Y. 36.

[2] *Supra*, § 350. See this view defended in Whart. Crim. Law, 8th ed., § 284.

[3] As to jury, see Whart. Crim. Pl. & Pr., §§ 716 *et seq.*; as to indictment, see ibid. §§ 85 *et seq.*; as to process for witnesses, see Whart. Crim. Ev., §§ 345 *et seq.*; as to counsel, see Whart. Crim. Pl. & Pr., §§ 555 *et seq.* That the limitation does not apply to trivial police offences, see People *v.* Justices, 74 N. Y. 406. That it prohibits sum-

Excessive bail and "fines and

§ 580. By the eighth amendment it is provided that "excessive bail shall not be required, nor ex-

mary convictions of juvenile offenders by inferior tribunals for infamous offences, see Com. *v.* Horregan, 127 Mass. 450. That a state statute providing that a defendant in a criminal prosecution may elect to be tried by a court and not by a jury is constitutional, see State *v.* Worden, 46 Conn. 349. That a defendant is entitled to be present at trial, see Whart. Crim. Law, 8th ed., §§ 540 *et seq.* That in a misdemeanor he may waive the right, see ibid. § 541; Owen *v.* State, 38 Ark. 512. As extending the right of waiver to offences of high grade, see Sahlinger *v.* People, 102 Ill. 241, citing Wilson *v.* State, 2 Ohio St. 319; Holliday *v.* People, 4 Gilm. 111; Hill *v.* State, 17 Wis. 675.

In Milligan, *ex parte*, 4 Wall. 106, it is said by Davis, J., giving the opinion of the majority of the court:—

"Another guarantee of freedom was broken when Milligan was denied a [redacted]ury. The great minds of the [redacted] have differed on the correct interpretation to be given to various provisions of the Federal constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime, who is not attached to the army or navy, or militia in actual service. The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury'—language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment or presentment before any one can be held to answer for high crimes, '*except* cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger;' and the framers of the constitution doubtless meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

"The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts; and in pursuance of the power conferred by the constitution, congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which congress has created for their government, and while thus serving surrenders his right to be tried by the civil courts. *All other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on the plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed

cessive fines imposed, nor cruel and unusual punishments inflicted." The first clause may be under- unusual punishments" prohibited.

by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the revolution.

"So sensitive were our revolutionary fathers on this subject, although Boston was almost in a state of siege when General Gage issued his proclamation of martial law, they spoke of it as an 'attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law.' The Virginia Assembly also denounced a similar measure on the part of Governor Dunmore, 'as an assumed power, which the king himself cannot exercise, because it annuls the law of the land, and introduces the most execrable of all systems, martial law.'

"In some parts of the country, during the war of 1812, our officers made arbitrary arrests, and by military tribunals tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of Smith *v.* Shaw and McConnel *v.* Hampton (reported in 12 Johnson, 257, 234), are illustrations, which we cite, not only for the principles which they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

"It is contended that Luther *v.* Borden, decided by this court, as an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II., in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislature would not afford the relief in their power; and without the authority of law, formed a new and independent constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. Borden, in the military service of the *old* government, broke open the [redacted] of Luther, who supported the [redacted] order to arrest him. Luther [redacted] suit against Borden; and the question was, whether, under the constitution and laws of the state, Borden was justified. This court held that a state 'may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;' and, if the legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which *this court* could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking into and entering Luther's house. This

stood as prohibiting bail disproportioned to the defendant's circumstances.[1] What punishments are "cruel" or "unusual"

is the extent of the decision. There was no question in issue about the power of declaring martial law under the Federal constitution, and the court did not consider it necessary even to inquire 'to what extent nor under what circumstances that power may be exercised by a state.'"

Chief Justice Chase, in an opinion in the same case, which was concurred in by Wayne, Swayne, and Miller, JJ., took the following distinctions:—

"That the third question, namely, Had the military commission in Indiana, under the facts stated, jurisdiction to try and sentence Milligan? must be answered negatively, is an unavoidable inference from affirmative answers to the other two.

"The military commission could not have jurisdiction to try and sentence Milligan, if he could not be detained in prison under his original arrest or under sentence, after the close of a session of the grand jury, without indictment or other proceeding against him.

"Indeed, the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in states where these tribunals were not interrupted in the regular exercise of their functions.

"Under it, in such states, the privilege of the writ might be suspended. Any person regarded as dangerous to the public safety might be arrested and detained until after the session of a grand jury. Until after such session, no person arrested could have the benefit of the writ; and even then, no such person could be discharged except on such terms, as to future appearance, as the court might impose. These provisions obviously contemplate no other trial or sentence than that of a civil court, and we could not assert the legality of a trial and sentence by a military commission, under the circumstances specified in the act and described in the petition, without disregarding the plain directions of congress.

"We agree, therefore, that the first two questions certified must receive affirmative answers, and the last a negative. We do not doubt that the positive provisions of the act of congress require such answers. We do not think it necessary to look beyond these provisions. In them we find sufficient and controlling reasons for our conclusions.

"But the opinion which has just been read goes further, and, as we understand it, asserts not only that the military commission held in Indiana was not authorized by congress, but that it was not in the power of congress to authorize it; from which it may be thought to follow, that congress has no power to indemnify the officers who composed the commission against liability in civil courts for acting as members of it.

"We cannot agree to this.

"We agree in the proposition that no department of the government of the United States—neither president, nor congress, nor the courts—possesses any power not given by the constitution.

"We assent, fully, to all that is said, in the opinion, of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil lib-

[1] Whart. Cr. Pl. & Pr., § 75.

has been the subject of much discussion. It is clear that solitary imprisonment at hard labor is neither "cruel" nor

erty. And we concur, also, in what is said of the writ of *habeas corpus*, and of its suspension, with two reservations: (1) That in our judgment, when the writ is suspended, the executive is authorized to arrest as well as to detain; and (2) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by congress, as well as arrest and detention.

"We think that congress had power, though not exercised, to authorize the military commission which was held in Indiana.

"We do not think it necessary to discuss at large the grounds of our conclusions. We will briefly indicate some of them.

"The constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the constitution have application in cases within the proper sphere of the former.

"What, then, is that proper sphere? Congress has power to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces, and to provide for governing such part of the militia as may be in the service of the United States.

"It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the constitution to the present time.

"Nor, in our judgment, does the fifth, or any other amendment, abridge that power. 'Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger,' are expressly excepted from the fifth amendment, 'that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' and it is admitted that the exception applies to the other amendments, as well as to the fifth.

"Now, we understand this exception to have the same import and effect as if the powers of congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The states, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces. Thus Massachusetts proposed that 'no person shall be tried for any crime by which he would incur an infamous punishment or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land forces.' The exception in similar amendments, proposed by New York, Maryland, and Virginia, was in the same or equivalent terms. The amendments proposed by the states were considered by the first congress, and such as were approved in substance were put in form, and proposed by that body to the states. Among those thus proposed, and subsequently ratified, was that which now stands as the fifth amendment of the constitution. We cannot doubt that this amendment was

"unusual" when duly imposed. Nor can whipping, for conviction of brutal crimes effected by force, be so pronounced.[1] "It has been found to be the most efficacious of penalties in checking certain classes of brutal crimes, and it may be far less cruel than certain durations and kinds of imprisonment. It cannot be rejected, therefore, as conflicting with the principle embodied in the constitutional sanction above given, though in some jurisdictions it may be forbidden by statute."[2] It may be added that the clause is exclusively applicable to the Federal courts, though similar provisions exist in the constitutions of most of the states.[3]

Jury trial secured in United States courts.

§ 581. By the seventh amendment, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law." This provision, which also applies only to Federal procedure, does not affect proceedings in equity or admiralty.[4] Nor does the clause preclude the conferring by congress on the court of claims the right to determine without a jury claims against the government.[5]

intended to have the same force and effect as the amendment proposed by the states. We cannot agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by action of the state conventions."

[1] U. S. *v.* Collins, 2 Curt. C. C. 194; Com. *v.* Wyatt, 6 Rand. 694; State *v.* Kearney, 1 Hawks, 53; Garcia *v.* Territory, 1 New Mex. 415.

[2] Whart. Crim. Pl. and Pr., 8th ed., § 921.

[3] Pervear *v.* Com., 5 Wall. 475. As sustaining the text, see James *v.* Com., 12 S. & R. 220; Foote *v.* State, 59 Md. 264; 4 Crim. Law Mag., 401. At the time when the expression was first introduced in state and federal legislation, whipping, so far from being "unusual," was a common mode of punishment.

[4] See Metcalf *v.* Williams, 104 U. S. 93; Mathews *v.* Tripp, 12 R. I. 256; The J. W. French, 13 Fed. Rep. 916; see *supra*, § 566.

[5] McElrath *v.* U. S., 102 U. S. 426; as to other limitations see Wynkoop *v.* Cooch, 89 Penn. St. 450; see, as to limitation in state constitutions, People *v.* Clark, 23 Hun, N. Y. 374; Swart *v.* Kimball, 43 Mich. 443; McCampbell *v.* State, 9 Tex. Ap. 124. That such limitations do not prevent judgments being taken, under statute or rule of court, for want of affidavit of defence, see Lawrance *v.* Borm, 86 Penn. St. 225; Dortic *v.* Lockwood, 61 Ga. 293;

XXIX. Reconstruction and Civil Rights.

§ 584. The thirteenth amendment, which we have next to consider, was, as has been already noticed, the formal declaration of an organic change of public sentiment.[1] It was felt throughout the land, however great may have been the reluctance in some sections to give expression to the feeling, and however perilous the transmutation might seem to many to be, that, after the war was over, domestic slavery could no longer exist; and at the south the abolition of slavery, no doubt, was recognized as a necessity as fully as at the north.[2] As giving formal efficiency to this conviction is to be regarded the thirteenth amendment, the first section of which provides that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall be duly convicted, shall exist within the United States, or any place subject to their jurisdiction." By the second section "congress shall have power to enforce this article by appropriate legislation." By this amendment alone are the character and effect of the abolition of slavery in the United States, so far as concerns the Federal government, to be determined. Mr. Lincoln's emancipation proclamation, so far as it went beyond the liberation, as a war measure, of slaves within the Federal lines, was a nullity.[3] It became, therefore, necessary, in order

Slavery and involuntary servitude prohibited except as punishment for crime.

see Neely *v.* State, 4 Baxt. 174. In Wall, *ex parte*, 107 U. S. 265, it was held that summary disbarring of an attorney by a court is not precluded by the above limitations. To the same effect is cited Fields *v.* State, Mart. & Yerg. 168. It has also been held that cases in the land or naval service are not within this restriction; Mason, *ex parte*, 105 U. S. 696.

[1] *Supra*, § 20.

[2] In the closing chapter of Mr. John Esten Cooke's interesting History of Virginia, a work none the less valuable from the fact that it is written from a distinctively Virginian stand-point, we have the following: "The Virginia people sincerely rejoice that African slavery is done away with; could not be persuaded to have it restored; and sincerely desire that the race may avail themselves of the system of public education, and become well-informed and respectable members of the community," p. 508.

The amendment prescribing the abolition of slavery was none the less "declaratory," in Burke's sense of the term, because the public sentiment it declared was the necessary consequent of circumstances. *Supra*, § 27. As to Mr. Lincoln's views in this respect, see *infra*, 593.

[3] "Fortunately," says Mr. Richard

to emancipate the slaves, not only in the border states, but in those sections of the "confederate" states where, by military action, emancipation had not been already effected, to obtain an amendment to the constitution which should operate throughout the whole Union; and the amendment to this effect, which is now immediately before us, was adopted under circumstances elsewhere stated.[1] The meaning of the amendment, construed, as it is necessary that it should be construed,[2] by the political conditions that preceded it, is plain, so far as concerns the clause in relation to slavery. Slavery, as thus abolished, is the domestic slavery of negroes as it existed in the southern states prior to the war; and this slavery, under the amendment before us, is no longer to exist. More difficult, however, are the questions arising from the words "involuntary servitude." One-fourth of the human race, comprising children under twenty-one years of age, live in a state of "servitude," which is so far involuntary that it cannot be imputed to any originating choice of their own. There are also multitudes of others, dependents of various classes, and weak-minded persons, who are subjected to what may be called "involuntary servitude," not imposed as a punishment on conviction of crime. In order, therefore, to harmonize the term with the adjudications of the courts, we must come to the following conclusions:—

(1) The term does not prohibit the servitude of child to parent.[3]

H. Dana, in an article in the North American Review of February, 1880, p. 133, "the proclamation was never brought to a test. There is little doubt that foreign states and our own judiciary would have treated it as ineffectual."—It was agreed in the cabinet, by both Mr. Chase and Mr. Seward, that beyond this limit the president's powers did not go. Ibid. See article by President Welling, North American Review, July, 1880, and *supra*, § 455. "Nothing short of a constitutional amendment," says Mr. George W. Julian, one of the prominent actors in the congressional reconstruction movement, "could at once give freedom; . . . and 'this,' as Mr. Lincoln declared in earnestly urging its adoption, 'is a king's cure for all evils. It winds the whole thing up.'" Julian's Political Recollections, 1884, p. 228.

[1] *Supra*, §§ 400, 401; *infra*, § 593.

[2] *Supra*, § 360.

[3] Schouler's Domestic Relations, §§ 245 *et seq.*

(2) Nor does it prohibit the compelling an apprentice to do service against his will.[1] Such indentures may bind the apprentice after he becomes of full age; but it has never been claimed that such involuntary servitude is an infraction of the constitution.[2]

(3) Nor does it preclude arrest and imprisonment of debtors in cases where such arrest is authorized by the local law; nor does it prevent their being compelled to do service when imprisoned. Such cases are very numerous. Imprisonment for debt, it is true, has been, as a rule, abolished, but there are still many cases in which an insolvent debtor, who is about to leave the jurisdiction, or is implicated in any fraud, in connection with the indebtedness, may be held to bail, and in default of bail, may be committed to prison, and subjected to all the rules as to service that may be there imposed.[3]

(4) Nor does it prohibit the committal of vagrants or "tramps" to workhouses or other asylums where they will be compelled to labor for their own support.[4]

(5) Nor does it preclude compulsory military service under a conscription. Such service, though shown to be involuntary, has been held to be constitutional.[5]

§ 585. It was not, however, considered sufficient to simply emancipate the negro. To make this emancipation operative

[1] In McPeck *v.* Moore, 51 Vt. 269, S. apprenticed himself to M., to learn a trade, and to do "such other chores and labor, when required, as would be necessary to" M. It was held that under the contract it was the duty of S., at M.'s order, to go into the cellar to repair a drain.

[2] See Schouler's Domestic Relations, § 459; Hastings *v.* Forsyth, 27 Vt. 646.

[3] Stone, *in re*, 129 Mass. 156; Corey *v.* Miller, 12 R. I. 337; Roberts *v.* Prosser, 53 N. Y. 260; People *v.* Tweed, 63 N. Y. 202; Jones *v.* Platt,, 60 How. N. Y. Pr. 73; Baxter *v.* Drake, 61 How. N. Y. Pr. 365; Pierson *v.* Freeman, 77 N. Y. 589; State *v.* Foote, 83 N. C. 102. That the United States courts make arrest and "involuntary servitude" for debt either on mesne process or execution depend upon the local law, see Louisiana Ins. Co. *v.* Nickerson, 2 Low. 310.

[4] Whart. Crim. Law, 8th ed., § 442; Whart. Cr. Pl. and Pr., 80; Crouse, *ex parte*, 4 Whart. 9; People *v.* Catholic Protectory, 61 How. N. Y. Pr. 445; Com. *v.* Keeper of Prison, 2 Ashm. 227; Way, *in re*, 41 Mich. 299; State *v.* Maxcy, 1 McMul. 501. But a state cannot, it is said, imprison in a house of correction a child who has committed no crime on the ground that he is destitute of proper parental care. People *v.* Turner, 55 Ill. 280.

[5] See *supra*, § 456.

it was held to be essential, in view of the relations and temper which generations of bondage had produced, that citizenship should be formally bestowed on him, and that he should have equal civil rights, so far as concerns freedom from legislative discrimination, with the white race. With this feeling was blended, as we will see hereafter more fully,[1] the conviction that, irrespective of the race question, the agitation of which would subside as soon as the negro's civil rights were secured, there should be a final constitutional prohibition placed on state legislation discriminating in any respect between persons subject to the law, or depriving any person of any rights without due legal process. To effect these important purposes the fourteenth amendment was proposed. This amendment is as follows:—

Citizenship confined to white and negro races.

"SECT. 1. *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.* No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"SECT. 2. *Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.*

"SECT. 3. *No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any*

[1] *Infra*, § 588.

office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

"SECT. 4. *The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.*

"SECT. 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The fifteenth amendment is as follows:—

"SECT. 1. *The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.*

"SECT. 2. *The congress shall have power to enforce this article by appropriate legislation.*"

Those portions of the above amendments which grew distinctively out of the late civil war, or which concern the emancipation and enfranchisement of the negro race, are placed, in the above rendering, in italics. Taking these up for immediate consideration, we must recur to the explanation already given of the circumstances under which the limitation as to citizenship was imposed. In several western states, where Indian tribes still lingered,[1] there was a strong popular feeling against recognizing the citizenship of Indians, while the states on the Pacific coast were determined to oppose any general measure which should confer the privileges of citizenship and of naturalization on the Chinese.[2] No amendment

[1] As to Indians, see *supra*, §§ 26, 265, 434; as to naturalization, see *supra*, §§ 177, 262, 431.

[2] That the Chinese cannot be naturalized, see *supra*, § 435. That Chinese may be excluded from juries, see State *v.* Ah Chew, 16 Nev. 50, 61.

to the constitution could be carried which conferred citizenship on either Indian or Chinese; any amendment which should, in uncompromising and absolute language, prescribe that all inhabitants of the country should be entitled to the same political privileges, would have been rejected, not merely on the grounds above stated, but from the general conviction that the supremacy of the states as to municipal matters should not be restrained further than the exigency of this particular emergency required. It was a necessary condition of reconstruction, so it was felt, that the negro should not only be rescued from slavery, but should be endowed with a citizenship whose privileges should not be subject to restriction. It was requisite, however, in order to secure a constitutional majority for this amendment,[1] (1) that no such rights should be conferred on Indians or Chinese, and (2) that the principle of "equality" should not be strained in such a way as to militate against either the rights of the states to regulate municipal law, or the rights of individuals to better themselves as far as their own energy and capacity would permit. From these conditions sprang the amendment above stated, which can only be fully understood by taking into consideration the circumstances which attended its passage. The words, "All persons born or naturalized in the United States," exclude Chinese emigrants, who, by law, as we have seen, are incapable of naturalization. The words, "and subject to the jurisdiction thereof," exclude Indians subject to tribal jurisdiction.[2] In construing this immediate clause, therefore, it

[1] See *supra*, § 400.

[2] That the fourteenth amendment does not make Indians citizens, see McKay *v.* Campbell, 2 Sawy. 119; Karrahoo *v.* Adams, 1 Dill. 344; Reynolds, *ex parte*, 18 Alb. L. J. 8; 15 Am. Law. Rev. 21.

In State *v.* Ah Chew, 16 Nev. 50, it was said by Hawley, J., giving the opinion of the court: "In construing the constitutional amendments and the civil rights bill, courts have always considered the history of the times when they were adopted, the general objects sought to be accomplished, and the evils they were designed to remedy. Their object was to secure to the African the civil rights which the white persons of the United States enjoyed, and to give to that race the protection of the general government in that enjoyment whenever it should be denied by any state. The amendments were primarily designed to give freedom to all persons of the African race within the United States, to prevent their future enslavement, to make them citizens, to prevent discrimination

must be remembered that its object was not, as has been sometimes proclaimed, to establish universal citizenship. It undoubtedly, in words to be hereafter more fully considered, declares that no state shall "deprive any person" (of any race) "of life, liberty, or property without due process of law;

against their rights as freemen, and to secure to them the privileges of the ballot. The language used necessarily extends some of the provisions to all persons of every race and color; but their general purpose is so clearly in favor of the African race that it would require a very strong case to make them applicable to any other. Slaughter-house Cases, 16 Wall. 36; Strauder *v.* West Virginia, 100 U. S. 303; Virginia *v.* Rives, ib. 313; *Ex parte* Virginia, ib. 339. The amendments did not confer the right of citizenship upon the Mongolian race, except such as are born within the United States. The treaty between the United States and China did not confer upon the Chinese, coming to this country, the right of citizenship. The same section which guaranteed to the Chinese subject certain 'privileges, immunities, and exemptions in respect to travel or residence,' contains the following proviso: 'But nothing herein contained shall be held to confer naturalization upon . . . the subjects of China in the United States.' § 6. The statute of this state provides that 'every qualified elector of the state . . . is a qualified juror of the county in which he resides.' 1 Comp. L. 1051. This statute does not deprive appellant of any right secured to him by the constitution, laws, or treaty.

"The Mongolian, or yellow race, to which appellant belongs, are denied the right to serve as jurors because they are aliens, and not on account of their color. There is no discrimination in the statute against any person because of his race or color. Appellant had all the privileges guaranteed to the subjects of the most favored nations. He had the same rights as an unnaturalized white person from England, Germany, or any other foreign country. No greater rights could have been secured to him in the circuit court of the United States. The qualification of jurors is the same in the United States courts as in the state courts. Rev. Stat. U. S. § 800; Stats. U. S. 1874–75, p. 336, § 4. The privilege, or duty, of being a juror is not always an incident of citizenship. There are citizens of the United States that are in the respective states denied the right to sit as jurors in the trial of civil or criminal cases. Women are citizens, but they are not, under the constitution and laws of this state, 'qualified electors.' They have no right to vote or hold any office. Yet they have the same right to a fair and impartial trial by jury as any other person. Some of the states limit the age of male citizens who are declared competent to serve as jurors. Yet it has never been held that a citizen over or under the prescribed age was denied any right secured to him by the constitution and laws of the United States. All persons, whether male or female, old or young, citizens or aliens, white, black, or yellow, are equally protected in the right of trial by a fair and impartial jury, indifferently selected, without discrimination, because of their race or color." See other cases, *supra*, §§ 434–5.

nor deny to any person within its jurisdiction the equal protection of the laws." But the object of the clause now specifically before us is (1) to confer citizenship on the negro race, excluding Indians and Chinese, and (2) to give equal civil rights, in terms hereafter to be more fully discussed, to all persons in the United States of whatever race.

Prohibition limited to state action, and not applicatory to discrimination by persons or corporations.

§ 586. The view that has just been stated is strengthened by the peculiar phraseology in which the amendment is couched. It would have been easy to have said, as was said by French philanthropists of the school of Rousseau, that there should be hereafter universal equality and fraternity; and visionary as such a clause might be, the courts would have to attempt, should it be made part of the supreme law, to carry it into effect. But this conception of equality the amendment carefully avoids. Not only does it contain no words prescribing such equality, but the prohibitions or discriminations it contains are directed, not to individuals, but to states. "No *state* shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any *state* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The amendment, therefore, is limited to the prohibition of any state legislation "abridging the privileges or immunities of citizens," or "depriving any person of life, liberty, or property, without due process of law;" or "denying any person within its jurisdiction the equal protection of the laws." It does not follow from this that congress may not, in the District of Columbia and in the territories, enact that there shall be no discrimination by common carriers and by inn-keepers against negroes; for, as to the District of Columbia and the territories, such legislation is constitutional. Nor does it follow from this that a negro, unjustly excluded from a railroad train, or from an inn, may not maintain at common law a suit for damages; for maintain such a suit he undoubtedly can. All that is said is that rights of this kind, to be exercised in the particular states, remain, after the

amendment, as they were before, exclusively under state control, and are not the subjects of Federal legislation.[1]

[1] As sustaining the positions taken in the text, see The Slaughter-house Cases, 16 Wall. 36; U. S. *v.* Reese, 92 U. S. 214; U. S. *v.* Cruikshank, 92 U. S. 542; S. C., 1 Woods, 322; Strauder *v.* West Virginia, 100 U. S. 303; aff. in Neal *v.* Delaware, 103 U. S. 370; Virginia *v.* Rives, 100 U. S. 313.

In October, 1883, in U. S. *v.* Stanley, 109 U. S. 3, and other cases, it was held that the sections of the "Civil Rights Bill," which give to "all persons within the jurisdiction of the United States" "full and equal enjoyment" of public conveyances, inns, and places of public amusement, are unconstitutional, so far as concerns the states.

"These cases," said Bradley, J., giving the opinion of the court, "are all founded on the first and second sections of the act of congress, known as the Civil Rights Act, passed March 1, 1875, entitled 'An act to protect all citizens in their civil and legal rights.' 18 Stat., 335. Two of the cases, those against Stanley and Nichols, are indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, are, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theatre; the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's Theatre, in San Francisco; and the indictment against Singleton being for denying to another person, whose color is not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House, in New York, 'said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude.' The case of Robinson and Wife against the Memphis & Charleston Railroad Company was an action brought in the circuit court of the United States for the western district of Tennessee, to recover the penalty of five hundred dollars given by the second section of the act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits under a charge of the court, to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of congress, and the principal point made by the exceptions was that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury in substance that, if this was the conductor's *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case is brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton come up on certificates of division of opinion between the judges below as to the constitutionality of the first and second

In giving equality of civil rights to all persons, while prohibiting state legislation discriminating against the negro

sections of the act referred to; and the case of Ryan, on writ of error to the judgment of the circuit court for the district of California, sustaining a demurrer to the information.

"It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional, none of the prosecutions can stand. The sections of the law referred to provide as follows:—

"'Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"'Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by state statutes; and, having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any state: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.'

"Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part. The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare that, in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and

race, the amendment before us is a just expression of the present experience of humane civilization.[1] And even for the

citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens, and *vice versa*. The second section makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

"Has congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments. The power is sought, first, in the fourteenth amendment, and the views and arguments of distinguished senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

"The first section of the fourteenth amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the states. It declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize congress to create a code of municipal law

[1] That this is a condition of all effective legislation, see *supra*, § 27.

negro race, taking it by itself, it is far better that, while secured from legislation discriminating against it, it should

for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in U. S. *v.* Cruikshank, 92 U. S. 542; Virginia *v.* Rives, 100 U. S. 313; and *Ex parte* Virginia, 100 U. S. 339.

"An apt illustration of this distinction may be found in some of the provisions of the original constitution. Take the subject of contracts, for example. The constitution prohibited the states from passing any law impairing the obligation of contracts. This did not give to congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised. The remedy which congress actually provided was that contained in the 25th section of the judiciary act of 1789, giving to the supreme court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority alleged to be repugnant to the constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunal sustained the validity of the law, the mischief could be corrected in this court. The legislation of congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and under the broad provisions of the act of March 3, 1875, giving to the circuit courts jurisdiction of all cases arising under the constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that, or any other law, it must appear as well by allegation, as proof at the trial, that the constitution had been violated by the action of the state legislature. Some obnoxious state law, passed or that might be passed, is necessary to be assumed in order to lay the foundation of any Federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against *state laws* impairing the obligation of contracts.

"And so in the present case, until

not be enervated by legislation discriminating in its favor; and that in this way it should have opened to it that freedom

some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws, or state action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures and supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the state without due process of law, congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore, congress may establish laws for their equal protection. In fine, the legislation which congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

"An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as those which arise in states that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the

of competition, by which, coupled with equality of civil rights, the moral and industrial capacity of either races or of individuals can be best developed.[1]

enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

"If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the states may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon congress to enforce the prohibition, this gives congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant in the tenth amendment of the constitution, which declares that powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. . . . .

"In this connection it is proper to state that civil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful

[1] "When a man," says Bradley, J., in U. S. *v.* Stanley, *ut sup.*, "has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freeman because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the thirteenth amendment (which merely abolished slavery), but by the fourteenth and fifteenth amendments."

§ 587. It may also be regarded as settled, that laws imposing penalties on sexual intercourse between

Laws imposing penalties on in-

act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuses and perpetration.

"Of course these remarks do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of congress, but is only submitted thereto for the purpose of rendering effective some prohibition against peculiar state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

"If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of U. S. *v.* Harris, decided at the last term of this court), it is clear that the law in question cannot be sustained by any grant of legislative power made to congress by the fourteenth amendment. That amendment prohibits the states from denying

tercourse between two races,

the two races are not unconstitutional when bearing equally on both races. This rule has been applied to any person the equal protection of the laws, and declares that congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse state legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed congress with plenary power over the whole subject is not now the question. What we have now to decide is, whether such plenary power has been conferred upon congress by the fourteenth amendment, and, in our judgment, it has not."

"We must not forget that the province and scope of the thirteenth and fourteenth amendments are different; the former simply abolished slavery; the latter prohibited the states from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of congress under them are different. What congress has power to do under one, it may not have power to do under the other. Under the thirteenth amendment, it has only to do with slavery and its incidents. Under the fourteenth amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the thirteenth amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings.

"The only question under the present head, therefore, is whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any state law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country. Many wrongs may be obnoxious to the prohibitions of the fourteenth amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private

to prosecutions for sexual intercourse between colored and white persons.[1] Laws, also, prohibiting

not unconstitutional.

property without due process of law; or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the fourteenth amendment, but would not necessarily be so to the thirteenth, when not involving the idea of any subjection of one man to another. The thirteenth amendment has respect, not to distinctions of race, or class, or color, but to slavery. The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

"Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the fourteenth amendment are forbidden to deny to any person? And is the constitution violated until the denial of the right has some state sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery, or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears.

"After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state; or if those laws are adverse to his rights, and do not protect him, his remedy will be found in the corrective legislation which congress has adopted, or may adopt, for counteracting the effect of state laws, or state action, prohibited by the fourteenth amendment. It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjec-

[1] The fact that a different punishment is affixed to the offence of adultery when committed between a negro and white person, than when the guilty persons are of the same race, is not obnoxious to constitutional objection under the fourteenth amendment. The discrimination is not directed against the person, but against the offence. Pace *v.* Alabama, 106 U. S. 583; affirming S. C., 69 Ala. 231; see U. S. *v.* Lee, 106 U. S 196.

the intermarriage of whites and blacks, are not unconstitutional if the races are subjected to the same penalties.[1]

tionable persons, who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the fourteenth amendment, congress has full power to afford a remedy under that amendment, and in accordance with it."

These conclusions are in accordance with the views expressed by Judge Cooley in his work on Torts, pp. 384–6; by Judge Emmons in the United States Circuit Court for the Western District of Tennessee (2 Am. L. T. Rep. (N. S.) 198); by Judge Barr in Kentucky, Smoot *v.* R. R., 13 Fed. Rep. 337; and by Judge Woods in Texas, Le Grand *v.* U. S., 12 Fed. Rep. 577. The decision was foreshadowed by rulings already cited (Virginia *v.* Rives, 100 U. S. 313; *Ex parte* Virginia, 100 U. S. 339), to the effect that the fourteenth amendment applied exclusively to state action, and by U. S. *v.* Harris, 1 Sup. Ct. Rep. 601; 106 U. S. 629, to be hereafter cited.

The only prior rulings affirming the constitutionality of the act are by Judge Cadwalader in U. S. *v.* Newcomer, 22 Int. Rev. Rec. 115; by Judge Nelson, of Minnesota, 7 Chicago Legal News, 311; and by Judge Blodgett, of Illinois, U. S. *v.* Taylor, 12 Chic. Leg. News, 416.

The ruling, by its express limitations, affirms the invalidity of any state legislation depriving negroes of equal civil rights, and hence state legislation is unconstitutional which would deny equal advantages in education to negroes (U. S. *v.* Buntin, 10 Fed. Rep. 730; Bertonneau *v.* Directors, 3 Woods, 177; State *v.* McCann, 21 Oh. St. 198; Cory *v.* Carter, 48 Ind. 327), or exclude them from juries. Virginia *v.* Rives; Strauder *v.* W. Virginia, *ut supra*.

At common law, also, innkeepers and hotel-keepers are liable in damages if they make unfair discriminations between persons paying the same fare. R. R. *v.* Brown, 17 Wall. 445; West Chester R. R. *v.* Miles, 55 Penn. St. 209; and other cases cited in note to U. S. *v.* Buntin, 10 Fed. Rep. 730; 10 Weekly Law Bull. 243.

In *Ex parte* Virginia, 100 U. S. 337, it was held that a Virginia county judge who, under a state statute excluded negroes from juries, was indictable under the act of congress making it indictable to administer a state law effecting such discrimination, it being held that the office of the county judge in this respect was not judicial but ministerial. This ruling is sustained on the ground that the action of the judge in question in excluding negroes from the jury was purely ministerial, and in execution of a state law.

That a statute excluding negroes from juries is unconstitutional, see Bush *v.* Kentucky, 107 U. S. 110.

That the reserved rights of the state are not, in matters not expressly given to congress by the recent amendments, affected by such amendments, see *supra*, § 373.

That the fourteenth amendment does not prohibit a state from making any

[1] Kinney, *ex parte*, 3 Hughes, 1; Francois, *ex parte*, 3 Woods, 367; Frasher *v.* State, 3 Tex Ap. 263; Kinney's Case, 30 Gratt. 858; Lonas *v.* State, 3 Heisk. 287.

§ 588. In the reprint of the fourteenth amendment, as given in a prior section, those clauses which are of special and tran-

arrangement it thinks best in distributing the jurisdiction of its courts, provided it does not make a distinction based on race or color, see Missouri *v.* Lewis, 101 U. S. 22.

In U. S. *v.* Harris, 106 U. S. 629, it was held that section 5509 U. S. R. S., which declares that "if two or more persons in any state or territory conspire to go in disguise upon the highway or on the premises of another for the purpose of depriving any person of the equal protection of the laws, etc., shall be punished," etc., is unconstitutional. To same effect, see Le Grand *v.* U. S., 12 Fed. Rep. 577.

In Green *v.* State, Sup. Ct. Ala., 1882, it was held that the fourteenth amendment does not determine the way in which a state law is to be obeyed; and, hence, that if no negroes appear on a grand jury, there being no law excluding them, the courts will presume that this was because there were none in the county having the statutory qualifications.

That the amendments before us do not prevent states, through their school boards, from establishing schools for colored children separate from those for white children, provided there be no discrimination as to opportunities of education, see People *v.* Gallagher (N. Y. Ct. App.), 28 Alb. L. J. 471; State *v.* McCann, 21 Ohio, 210; Cory *v.* Carter, 48 Ind. 327; Roberts *v.* Boston, 5 Cush. 198.

In the opinion of Ruger, C. J., giving the opinion of the court in People *v.* Gallagher, *ut sup.*, we have the following:—

"The supreme court of Ohio, in the case of The State *v.* McCann, *supra*, had before them the effect of the constitutional amendment in a case precisely similar to the one at bar, and held by the unanimous opinion of all of the members of that court, that the establishment of separate schools for the education of colored children, and their exclusion from the schools designed for whites alone, did not constitute a violation of the rights of colored persons under the constitution. The following cases arising in different states may be referred to as supporting the same doctrine: Cory *v.* Carter, 48 Ind. 327; People *v.* Easton, 13 Abb. (N. S.) 159; Ward *v.* Flood, 48 Cal. 36; Dallas *v.* Fosdick, 40 How. Pr. 249; State *v.* Duffy, 7 Nev. 342.

"These cases show quite a uniform current of authority in favor of that interpretation of the constitutional amendment which we have given to it. We have given careful examination to the various cases cited by the appellant's counsel in support of his argument, and are of the opinion that none of them conflict with the conclusions at which we have arrived. The following cases cited by him arose under statutes which either expressly forbade or did not authorize the school authorities to separate the races, and assign them to different places for instruction: Board of Education *v.* Tinnon, 26 Kan. 1; Clark *v.* Board of Directors, 24 Iowa, 266; Smith *v.* Directors, 40 id. 518; Dove *v.* School Dist., 41 id. 689; People *v.* Board of Education, 101 Ill. 308; People *v.* Board of Education, 18 Mich. 400. The following cases, also cited by the appellant, are distinguishable from this, as arising under the laws of the several states or districts where rendered which absolutely prohibited the particular act complained of. They did not in-

sient operation are placed in italics, so as to bring out distinctively the clause which is permanent and universal in its operation.[1] In making this distinction, and in speaking of the clauses relative to the negro race and the late civil war as transient and special, it is not meant in any way to disparage the immense benefit conferred, not only on the United States, but on humanity, by the results of the civil war. They have made the United States a power now, in many respects, the greatest in the world. They have shown that a republican form of government can be as efficient in maintaining its supremacy as can a despotic form of government; and that the loyalty of the citizens of a republic may be at least as determined and self-sacrificing as the loyalty of the subjects of a king. They have won for the United States an international position far higher, as we have seen,[2] than could have been won by any

Equal protection of laws granted to all persons.

volve the construction of the constitutional amendments on the rights of colored persons arising thereunder: Central Railroad Co. *v.* Green, 86 Penn. St. 421; Decuir *v.* Benson, 27 La. Ann. 1; Donnell *v.* State, 48 Miss. 661; Coger *v.* Union Packet Co., 37 Iowa, 145."

In Claybrook *v.* Owensboro, 16 Fed. Rep. 297, it was held that an act of a state legislature authorizing a municipal corporation to levy a tax for the benefit of public schools within its limits, but directing that the tax collected of the white people should be used to sustain public schools for white children only, and the tax collected of the colored people should be used to sustain schools for colored children, the effect of such discrimination being to give the whites excellent school facilities and a school session annually of nine months, and the colored children few school opportunities, and a session of three months, is unconstitutional. See U. S. *v.* Harris, 106 U. S. 629. "The equal protection of the laws," said Barr, J., "guaranteed by this amendment, must and can only mean that the laws of the states must be equal in their benefit as well as equal in their burdens, and that less would not be 'the equal protection of the laws.' This does not mean absolute equality in distributing the benefits of taxation. This is impracticable; but it does mean the distribution of the benefits upon some fair and equal classification or basis. See Virginia *v.* Rives, 100 U. S. 313; *Ex parte* Virginia, id. 339; Strauder *v.* West Virginia, id. 303; Neal *v.* Delaware, 103 U. S. 370; Bertonneau *v.* Directors, etc. 3 Woods, 177; U. S. *v.* Buntin, 10 Fed. Rep. 730; Cooley, Torts, 289; Ward *v.* Flood, 48 Cal. 36; Smith *v.* Directors Ind. School Dist., etc. 40 Iowa, 518; Roberts *v.* Boston, 5 Cush. 198; State *v.* McCann, 21 Ohio St. 198; Cory *v.* Carter, 48 Ind. 362; Ah Kow *v.* Nunan, 5 Sawy. 552; Parrott's Chinese Case, 6 Sawy. 349."

[1] See *Infra*, § 594.

[2] *Supra*, § 134; *infra* § 595.

accession of territory or wealth, no matter how vast. They have abolished slavery, the curse of the country both north and south, and in the fact of this abolition there has been an acquiescence so general that there are very few even among the white race of the south who would desire to have slavery back. Yet, with all this, the effect of these amendments, so far as concerns the civil war and the negro race, is now virtually completed; and these particular clauses can be as much dropped out of sight, so far as the adjustment of litigated relations are concerned, as the Declaration of Independence is dropped out of sight in the settlement of current litigation. The disqualifications for participation in the insurrection have vanished; never again will questions of this class arise. A large part of the Federal debt has been paid off; so far from the remainder being "questioned," it now stands higher in the money markets than any security in the world. The "confederate" debt has no market value; nor is there the least probability that any state in the Union, even if it were free to do so, would assume that debt. The negro under the final construction given to the amendment by the supreme court has now precisely the same civil rights as the white man. He has no less, but he has no more; and hence the difference between the races can no longer be a determining incident in litigation. The amendment, therefore, in so far as concerns its relations to the negro race, and to the late civil war, has done its work; and passing, as we are consequently entitled to do, from that which is special and temporary to that which is permanent and universal, our attention is turned to that remarkable clause which making, as has been already noticed, a new epoch in our constitutional history, places the people of the states out of the reach of arbitrary action of their own legislatures. We can scarcely overestimate the importance of this clause.—That there has been for years a tendency on the part of the courts, both Federal and state, to treat the states as absolute in all matters not delegated to the Federal government, has been noticed; and the objection, as has been observed, to the argument of the majority of the supreme court in the Elevator Case, and to some extent in the railroad cases that followed in the same line, is not so much in the con-

clusion reached as in the position incidentally taken more or less fully that it is within the power of state legislatures to regulate at least such business within their domains as relates to the common affairs of the people.[1] The objections to such an extension of legislative jurisdiction have been already stated.[2] So far as concerns the amendment immediately before us, it may be enough here to say that the jealousy of over-legislation, which has grown up in the American people as one of the results of their political training,[3] is not limited to Federal legislation. There is an equal impatience of over-legislation by the states; and the conviction that matters which individual effort and competition can effect had better not be undertaken by legislation, as well as the conviction that private property should be protected from legislative attacks, oppose themselves to state legislative encroachments at least as resolutely as to Federal legislative encroachments. This is evidenced in the tenth amendment. "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, *or to the people.*" It does not follow, therefore, that because a power is not delegated to the United States, nor prohibited to the states, that it can be exercised by the state legislatures. It may be one belonging to the people as such, and if so, it is one the state legislatures cannot exercise. The line, however, is not laid down in the tenth amendment, as just stated, between what powers may be exercised by the state legislatures and what powers belong exclusively to the people of the states. The amendments now before us supply this deficiency. They preclude the state legislatures from exercising two important functions: (1) No one can be reduced to involuntary servitude except in punishment for crime. (2) Life, liberty, or property cannot be taken "without due process of law;"[4] nor can a state "deny to any person within its jurisdiction the equal protection of the laws." The meaning of the term "due process of law" has been

[1] See *supra*, §§ 488–9; *infra*, § 595.
[2] *Supra*, §§ 365, 490.
[3] *Supra*, §§ 21, 27.
[4] As to this, see *supra*, § 566.

already discussed.[1] By the amendment now before us this limitation is imposed on the states, as it had been imposed by the fifth amendment on the Federal government. Hence it has been held that by virtue of this clause in the fourteenth amendment, Chinese are entitled to be protected from any legislation which would deprive them of equal protection of the laws, though not citizens or entitled to naturalization.[2]— The distinction between the "abridging privileges and immunities of citizens" and "equal protection of the laws" is that the first is political, and the second legal. By the first, which is for the exclusive benefit of citizens, political equality cannot be withheld; by the second, which refers to persons of all races, there can be no discriminating punishment inflicted on any particular person, and no refusal of equal access to the courts. The amendment forbids, also, with equal emphasis, any state legislation discriminating between different classes of persons by imposing burdens on one class (whether it consist of corporations or of private individuals) which are not imposed on other classes, or by taking away, without fair compensation and due trial, the rights or franchises of one class for the benefit of another class. When we consider the magnitude of this provision, in checking over-legislation, and in keeping in the hands of the people themselves, to be adjusted by their own enterprise and free competition, their own business in all matters not of police, we appreciate more fully the fact, already noticed, that the provisions contained in these amendments, bearing distinctively on the negro race, are comparatively ephemeral in their character, while the clause before us is likely to be permanent, and to permeate the whole business system of the Union. Almost all the adjudications in respect to the amendment have, heretofore, related to negro rights. But these are now finally settled, as elsewhere more fully appears,[3] and the real importance of the amendment, in securing the rights of the people as a body, is now becoming disclosed.[4]

[1] *Supra*, §§ 566 *et seq.*

[2] Ah Kow *v.* Nunan, 20 Alb. L. J. 250; 5 Sawy. 552; Quong Woo, *in re*, 26 Alb. L. J. 152.

[3] *Supra*, § 586; *infra*, § 594.

[4] "The mischief to be remedied," said Judge Bradley, in the Slaughter-house Cases, 16 Wall. 67, "was not merely slavery and its incidents and emergencies; but that spirit of insubor-

Basis of representation to be

§ 589. The second section of the fourteenth amendment (which was adopted, it should be remembered

dination and disloyalty to the national government, which had troubled the country for so many years in some of the states, *and that intolerance of free speech and free discussion, which often rendered life and liberty insecure, and led to much unequal legislation.*"

"Though the occasion of the amendment was the supposed denial of rights in some states to newly-made citizens of the African race, and the supposed hostility to union men, the generality of the language used extends the protection of its provisions to persons of every race and condition against discriminating and hostile state action of any kind. Its effect in preserving free institutions, and preventing harsh and oppressive state legislation, can hardly be overstated. When burdens are placed upon particular classes or individuals, while the majority of the people are exempted, little heed may be paid to the complaints of those affected. Oppression thus becomes possible and lasting. But a burdensome law operating equally upon all will soon create a movement for its repeal. With the amendment enforced, a bad or an oppressive state law will not long be left on any statute book. The argument that a limitation must be given to the scope of this amendment because of the circumstances of its origin is without force. Its authors, seeing how possible it was for the states to oppress without relief from the Federal government, placed in the constitution an interdict upon their action which makes lasting oppression of any kind by them under the form of law impossible. The amendment prohibiting slavery and involuntary servitude, except as a punishment for crime, had its origin in the previous existence of African slavery. But the generality of its languages makes its prohibition apply to slavery of white men as well as that of black men; and also to serfage, vassalage, villenage, peonage, and every other form of compulsory labor to minister to the pleasure, caprice, vanity, or power of others." Field, J., R. R. Tax Cases, 13 Fed. Rep. 740. That under this amendment property cannot be taken without due process of law, see Burns *v.* R. R., 15 Fed. Rep. 177.

In R. R. Tax Cases, 13 Fed. Rep. 722, it was held that the "equal protection of the laws" to any one implies not only that he has a right to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. And it was ruled that uniformity in taxation requires uniformity in the mode of assessment as well as in the rate of percentage charged. S. P., Sonoma County Tax Case, 13 Fed. Rep. 789.

In Memphis Co. *v.* Nolan, 14 Fed. Rep. 532, it was held that a tax on an express company engaged in interstate business is not by itself unconstitutional. As to taxation by the Federal government, see further, *supra*, §§ 404 *et seq.*

In Santa Clara *v.* R. R., 18 Fed. Rep. 385, it was held that this provision applies to corporations, and prevents their subjection to unjust discrimination.

"The first section of the fourteenth amendment" said Field, J., "places a

before the fifteenth, which extends to the negro race the right of suffrage) provides that when "the right

reduced in proportion to abridg-

limit upon all the powers of the state, including, among others, that of taxation. After stating that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state in which they reside, it declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any *person* (dropping the designation 'citizen') of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' The amendment was adopted soon after the close of the civil war, and undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the states throughout the broad domain of the republic. A constitutional provision is not to be restricted in its application because designed originally to prevent an existing wrong. Such a restricted interpretation was urged in the Dartmouth College Case, to prevent the application of the provision prohibiting legislation by states impairing the obligation of contracts to the charter of the college, it being contended that the charter was not such a contract as the prohibition contemplated. Chief Justice Marshall, however, after observing that it was more than possible that the preservation of rights of that description was not particularly in view of the framers of the constitution when that clause was introduced, said:—

"'It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.' 4 Wheat. 644.

"All history shows that a particular grievance suffered by an individual or a class, from a defective or oppressive law, or the absence of any law, touching the matter, is often the occasion and cause for enactments, constitutional or legislative, general in their character, designed to cover cases not merely of the same, but all cases of a similar nature. The wrongs which were supposed to be inflicted upon or threatened to citizens of the enfranchised race, by special legislation directed against them, moved the framers of the amendment to place in the fundamental law of the nation provisions not merely for the security of those citizens, but to insure to all men, at all times, and at all places, due process of law, and the equal protection of the laws. Oppression of the person and spoliation of property by any state were thus forbidden, and

ment of right of suffrage. to vote . . . is denied to any of the male inhabitants of such states, being twenty-one years

equality before the law was secured to all. In the argument of the San Mateo Case in the supreme court, Mr. Edmunds, who was a member of the senate when the amendment was discussed and adopted by that body, speaking of its broad and catholic spirit, said: 'There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted, there was no conceivable posture of affairs to the people who had it in hand' which was not considered. And the purpose of this long and anxious consideration was that protection against injustice and oppression should be made forever secure—to use his language—'secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure, in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the states and the whole body of the people.'

"With the adoption of the amendment the power of the states to oppress any one under any pretence or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political body, or to a religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed government holds at all times over every one, man, woman, and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No state—such is the sovereign command of the whole people of the United States—no state shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no state, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws."

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable,

of age, *and citizens of the United States*, or in any way abridged, except for participation in rebellion or other crime,

but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, levelled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the San Mateo Case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read, as contended it does in law: 'Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdic tion the equal protection of the laws, *except it be by taxation.*' No such limitation can be thus ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws.

"Soon after the adoption of the amendment, congress recognized by its legislation the application of the prohibition to unequal taxation. The original civil rights act, previously passed, made persons of the emancipated race citizens, and declared that all citizens of the United States, of every race or color, should have the same rights in every state and territory to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, own, and convey real and personal property; and to the benefit of all laws and proceedings for the security of persons and property,—as was enjoyed by white citizens, and should be subject to like punishments, pains, penalties, and to none other. After the adoption of the amendment the act was reënacted, and to the clause that all persons should enjoy the same rights as white citizens, and be subject to like punishments, pains, and penalties, it added, and subject only to like '*taxes, licences, and exactions of every kind, and to no other.*' The congress which reënacted the civil rights act with this addition was largely composed of those who had voted for the amendment; and it is well known that oppressions by unequal taxation were the subject of consideration before the committee of the two houses under whose direction the amendment was proposed. But were this otherwise, and were the wrong of such unequal taxation not prominently in the minds of the framers, it being within the language, it must be held to be within the operation of the prohibition. As truly and eloquently said Mr. Conkling in the argument of the San Mateo Case:—

"'If it be true that new needs have come; if it be true that wrongs have arisen, or shall arise, which the framers in their forebodings never saw, wrongs which shall be righted by the words they established, then all the more will those words be sanctified and consecrated to humanity and progress.'

"The fact to which counsel allude, that certain property is often exempted

the basis of representation therein shall be reduced in the proportion which the number of the male citizens shall

from taxation by the states, does not at all militate against this view of the operation of the fourteenth amendment in forbidding the imposition of unequal burdens. Undoubtedly, since the adoption of that amendment, the power of exemption is much more restricted than formerly, but that it may be extended to property used for objects of a public nature is not questioned, that is, where the property is used for the promotion of the public well-being and not for any private end. Thus property used for public instruction, for schools, colleges, and universities, which are open to all applicants on similar conditions, may properly be exempted. The public benefit is the equivalent to the state for the tax which would otherwise be exacted. If buildings, used as churches for public worship, are also sometimes exempted, it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws. Whatever the exemption, it can only be sustained for the public service or benefit received. The equality of protection which the fourteenth amendment declares that no state shall deny to any one, is not thus invaded. That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute only his just proportion to the general fund. When such exaction is made without reference to a common ratio, it is not a tax, whatever else it may be termed; it is rather a forced contribution, amounting, in fact, to simple confiscation. As justly said by the supreme court of Kentucky, in the celebrated case of Lexington v. McQuillan's Heirs, whenever the property of a citizen is taken from him by the sovereign will and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax unless similar contributions be exacted by the same public will from such members of the same community as own the same kind of property; and, although there may be a discrimination in the subjects of taxation, still persons of the same class and property of the same kind must generally be subjected alike to the same common burden. 9 Dana (Ky.), 513.

"The cases of People v. Weaver, 100 U. S. 539, and of Evansville Bank v. Britton, 105 U. S. 322,, will illustrate the character of the discrimination of which the defendants complain. By an act of congress passed in 1864, and re-enacted in the Revised Statutes, the shares in national banks are allowed to be included in the valuation of the personal property of the owner in the assessment of taxes imposed by authority of the state in which the banks are located, subject to two restrictions: that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state, and that the shares owned by non-residents of the state shall be taxed at the place where the bank is located. Rev. St., § 5219. In People v. Weaver, 100 U. S. 539, the meaning of these restrictions upon the state was considered by the supreme court, and it was held:—

"'(1) That the restriction against discrimination has reference to the entire process of assessment, and includes

bear to the whole number of male citizens twenty-one years of age in such state." This clause is deserving of consi-

the valuation of the shares, as well as the rate of percentage charged thereon; (2) that a statute of New York, which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital, was in conflict with the restriction, although no greater percentage was levied on such valuation than on other moneyed capital; and (3) that a statute which permitted a party to deduct his just debts from the valuation of his personal property, except so much as consisted of those shares, taxed them at a greater rate than other moneyed capital, and was, therefore, void as to them.'

"The discrimination there condemned by which an increased value was given to the shares of the national banks beyond what was given to other moneyed capital, is a discrimination similar to that made by the elimination of mortgages in estimating the value of railroad property in the cases before us. In Evansville Bank *v.* Britton the doctrine of this case is approved, and it was held that the taxation of shares in the national banks, under a statute of Indiana, without permitting the owner to deduct from their assessed value the amount of his *bona fide* indebtedness, as he was permitted to do in the case of other investments of moneyed capital, was a discrimination forbidden by the act of congress."

In the Railroad Tax Cases, 13 Fed. Rep. 763, it is said by Sawyer, J.: "Having stated the principle, which I conceive to be established by an unbroken line of authorities, I shall refer to some of them. One of the latest and most instructive cases upon the subject was recently decided by the court of appeals of the state of New York, from which I shall extract a passage which I adopt as expressing my own views, and presenting the question in a very clear and satisfactory light. It involved the validity of an assessment for a public street improvement, and but one question, which was decisive of the case, was examined or determined. The question was as to the validity of the law under which the assessment was made. The court, by Mr. Justice Earl, says: 'The latter assessment could be made without any notice to or hearing of any person. The law requires no notice, and a provision for notice cannot be implied. Upon the assumption that the law was valid, there was ample authority for the commissioners to make the assessment without any notice or hearing.' Stuart *v.* Palmer, 74 N. Y. 183, 186. The judge proceeds:—

"'I am of the opinion that the constitution sanctions no law imposing such an assessment without a notice to and a hearing, or an opportunity of a hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require a notice to them, and give them a right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.' . . . Id. 188.

"'The legislature can no more arbi-

deration in two important relations: (1) It strengthens the position already taken, that the object of the amendment

trarily impose an assessment for which property may be taken or sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defence of his rights; and the constitutional provision that no person shall be deprived of these without due process of law, has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or state constitutions. It is a limitation upon arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do, nor authorize to be done. "Due process of law" is not confined to any judicial proceedings, but extends to every case which may deprive a citizen of his life, liberty, or property, whether the proceedings be judicial, administrative, or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.'" . . Id. 190.

"'No case, it is believed, can be found in which it was decided that the constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain *dicta* of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment.'" Id. 195.

"Much more is worth quoting, but it would extend this opinion to an unreasonable length.

"Thus, it is determined in the case cited, that a party is not only entitled to notice and an opportunity to be heard, but that the law, or constitution itself, must expressly provide for notice. This decision was approved by the supreme court of California, in October last, in Mulligan *v.* Smith, involving the validity of a tax. 8 Pac. Coast Law J. 499. Said McKinstry, J.: 'In my opinion the statute provides no notice or process by means of which the property owners can be subjected to the judgment of the county court. The act is therefore void;' citing Stuart *v.* Palmer, *supra;* Cooley, Taxation, 266, and other cases; and McKee, J., in the same case said:—

"'It is a principle which underlies all forms of government by laws that a citizen shall not be deprived of life, liberty, or property, without due process of law. The legislature has no power to take away any man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time, place, and

is the correction and moulding of state legislation so as to insure the protection of the negro race, and not the establish-

tribunal to be heard in defence of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature.'

"In Patten *v.* Green, 13 Cal. 329, Mr. Justice Baldwin, all the justices, including Mr. Justice Field, concurring in the opinion, said: 'We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax land as they choose, without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power.' The raising of the tax by the board of equalization was held void for want of notice. Mr. Webster, in the Dartmouth College Case, defined due process of law, or 'the law of the land,' as 'the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.' He adds: 'Everything which may pass under the form of an enactment is not "the law of the land."'

"In Cooper *v.* Board of Works, 108 Eng. C. L. R. 181, in which was in question the action of the board of public works, in pursuance of a statute which did not require notice, Willes, J., said: 'I apprehend that a tribunal, which is by law invested with power to affect the property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principles of justice.' In the same case, Byles, J., said: 'The judgment of Mr. Justice Fortescue, in Dr. Bentley's Case, is somewhat quaint, but it is very applicable, and has been the law from that time to the present.' He says: 'The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he called upon him to make his defence. "Adam, where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?"' See, also, Philadelphia *v.* Miller, 49 Pa. 440; Matter of Ford, 6 Lans. 92; Overing *v.* Foote, 65 N. Y. 263; Westervelt *v.* Gregg, 12 N. Y. 202; Cooley, Const. Lim., 355; Butler *v.* Sup'rs Saginaw, 26 Mich. 22, 29; Sedg. St. & Const. Law (Pomeroy's ed.), 474 *et seq.*, and notes; Cooley, Taxation, 266, 267.

"In Davidson *v.* New Orleans, 96 U. S. 97, it was not questioned, but assumed, that the party taxed must have an opportunity to be heard, and decided upon that theory.

"In my judgment the authorities establish beyond all controversy that somewhere in the process of assessing a tax under a law, or a state constitution, at some point before the amount of the assessment becomes finally and irrevocably fixed, the statute or the state constitution must provide for notice to be given to the owner of the property taxed, and an opportunity to be afforded to make objections, and to be heard upon them. In some form or manner he must be afforded an oppor-

ment of "social equality." The state legislatures are to be induced to give the suffrage to the negro race by a promise of

tunity to defend his interests. In this case the constitution makes no provision for notice or a hearing, and the answer alleges that there was none, which is admitted by the demurrer.

"What constitutes the equal protection of the law is well stated in Ah Kow *v.* Nunan, 5 Sawy. 552; *In re* Ah Fong, 3 Sawy. 144; Pearson *v.* Portland, 69 Me. 278; Portland *v.* Bangor, 65 Me. 120; Missouri *v.* Lewis, 101 U. S. 22. See, also, Live Stock, etc. Ass'n *v.* Crescent City Co., 1 Abb. 398; Parrott's Chinese Case, 6 Sawy. 377."

The Maine statute of 1872, providing that no person shall recover for damages caused by a defective highway, when such person is a resident of any state which does not permit analogous litigation, is in conflict with the clause in the fourteenth amendment which prohibits states from denying to any person the "equal protection of the laws." Pearson *v.* Portland, 69 Me. 278.

The amendment, however, does not preclude the giving exclusive privileges in supplying certain text-books to particular persons; Bancroft *v.* Thayer, 5 Sawy. 502; nor the imposing particular burdens on particular professions or business callings. Baker *v.* State, 54 Wis. 368.

With this amendment the statutes in some of the states precluding alien residents from holding real estate may conflict. See *supra*, § 261.

In Brosnahan, *in re*, 18 Fed. Rep. 62, the question arose whether a Missouri statute making it punishable to manufacture "out of any oleaginous substance" articles "designed to take the place of butter and cheese produced from pure unadulterated milk," was in conflict with the clause of the fourteenth amendment above given. It was held that it was not. "The statute," said Miller, J., "does not, in direct terms, authorize the seizure or taking of any property, not even that whose manufacture is forbidden. The party is not, in fact, deprived of this property by the statute, or by any proceeding which it authorizes. The personal punishment, by fine and imprisonment, which the statute imposes, must be inflicted according to the law of Missouri, which allows a trial by jury, with all the other forms which from time immemorial have been held to be due process of law. The moneyed fine, then, and the liberty of which the party may be deprived, are undoubtedly imposed by due process of law.

"If it be urged, as it has in some cases, that the effect of the statute upon the right to sell the property is such as to destroy its value, and therefore to deprive the owner of it, there are several answers to the proposition: *First*, the value of the property can hardly be so affected that the party may be said to be deprived of it, while it can readily be transported into some other state, and sold without restriction; *secondly*, and conclusively, that as to the product made or imported into the state after the passage of the statute, the statute was and must be taken as part of the due process of law, and deprived the party of nothing which he owned when it was passed, or which he had a right to make or acquire for sale as food at the time he did so make or buy it. The law in such case did not deprive him of his property. If he is injured in relation to that property, it is by his own action in buying or making it with the statute before his eyes. That statute

increased representation if such suffrage be given. There is nothing in this particular clause which authorizes legislation by congress securing such suffrage, though this is afterwards secured by the fifteenth amendment. (2) Exclusion from the right of suffrage of persons who cannot read or write, or who do not pay a poll-tax, does not reduce *pro tanto* the basis of representation, since the disqualification of such persons is one

was, as to him and to his property, due process of law, of which he had due notice. Bartemeyer *v.* Iowa, 18 Wall. 129. His injury or loss, if any, arises out of his determination to defy the law, and it is by the law and its mode of enforcement, which, existing at the time, is due process of law, that he must be tried.

"5. The evidence in favor of the petitioner is abundant, and of the highest character, to prove that the article which he sells, and which he is forbidden to sell by the statute of Missouri, is a wholesome article of food prepared from the same elements in the cow which enable her to yield the milk from which butter is made, and when made by Mege's process is the equal in quality for purposes of food of the best dairy butter. No evidence is offered by counsel for Rucker or for the state to contradict this, because they say it is wholly immaterial to the issue before the court. A very able argument is made by counsel, whose ability commands our respect, to show that, such being the character of the article whose manufacture and sale is forbidden by the statute, the legislature of Missouri exceeded its powers in passing it. It is not so much urged that anything in the constitution of Missouri forbids or limits its power in this respect by express language, as that the exercise of such a power in regard to a property shown to be entirely innocent, incapable of any injurious results or damage to public health or safety, is an unwarranted invasion of public and private rights, an assumption of power without authority in the nature of our institutions, and an interference with the natural rights of the citizen and of the public, which does not come within the province of legislation. The proposition has great force, and, in the absence of any presentation of the matters and circumstances which governed the legislature in enacting the law, we should have difficulty in saying it is unsound. Fortunately, as the case before us stands, we feel very clear that, even if well founded, the objection to the statute is one which we cannot consider in this case."

That a judgment in tort does not come under the protection of the limitation in the text, see Louisiana *v.* New Orleans, U. S. Sup. Ct., 1883. In the same case it was held that the limitation does not render unconstitutional a statute reducing taxation so as to impair a city's capacity to meet its indebtedness.

That an ordinance of San Francisco, prescribing that the hair of male prisoners should be cropped to a uniform length, is unconstitutional as discriminating against the Chinese, see Ah Kow *v.* Nunan, 5 Sawyer, 552; 9 Cent. L. J., 1250; 20 Alb. L. J., 250. But see comments in Whart. Crim. Pl. & Pr., § 920.

they are capable of removing by their own action. "To require the payment of a capitation tax is no denial of suffrage; it is demanding only the preliminary performance of public duty, and may be classed, as may also presence at the polls, with registration, or the observance of any other preliminary to insure fairness and protect against fraud. Nor can it be said that to require ability to read is any denial of suffrage; . . . ability to read is something within the power of any man; it is not difficult to attain it, and it is no hardship to acquire it."[1] (3) It is otherwise, however, as to a property qualification so great as to work arbitrary exclusions in many cases beyond individual power to surmount, and as to arbitrary discriminations against naturalized citizens.

§ 590. The fourth section of the fourteenth amendment, already noticed, also deserves consideration, as showing that the amendment as a whole is meant not to determine the social relations of citizens, nor to invade the authority of the states, but to restore the equipoise that had been disturbed by the civil war, and to give a constitutional sanction to its results. The first clause of this section can only be explained on this hypothesis. It provides that "the validity of the public debt of the United States authorized by law, including debts for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned." And as a final constitutional seal affixed to the results of the war it is provided that "neither the United States, nor any state, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."

Validity of public debt not to be questioned, and assumption of insurrection and emancipation debts prohibited.

§ 591. It is worthy of notice that the thirteenth, fourteenth, and fifteenth amendments conclude with the provision "the congress shall have power to enforce, by appropriate legislation, the provisions of this article." The words "*appropriate* legislation" confer no new

Legislation in support of this and other amend-

[1] Cooley's Principles Const. Law, 264.

additional power on congress. They are a limitation, rather than a grant. Congress has no power of general legislation on the topic of race discrimination. Its power is simply that of passing measures which execute the specific powers given in the clauses immediately preceding. Legislation which extends beyond the lines indicated by the prior portions of the amendments is, unless authorized by other portions of the constitution, unconstitutional.[1]

ments must be "appropriate."

§ 592. The fifteenth amendment, as above given, provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." A superficial view of this amendment would lead to the conclusion that it establishes universal suffrage so far, at least, as concerns race or color or prior servitude. Such, however, is not the case. It removes "race" or "color" or "servitude" distinctions only in respect to "citizens of the United States," and it thereby does not include Indians or Chinese. It is, therefore, an additional illustration of the principle already stated that the group of amendments of which this is a part were designed to seal the results of the war and not to establish any new rule of social or political equality.

Negro suffrage granted.

§ 593. At the close of the late civil war, the states which had been in insurrection, and in which the authority of the government of the United States had been temporarily overthrown, were placed under provisional military control. This was an exercise of the war-power, sustained by the law of nations.[2] Statutes, called the "reconstruction" acts, were then adopted by congress authorizing the readmission of these states to their former rights in the Union under certain conditions. These conditions were complied with, and the states in question resumed their position in the Federal councils, and united in the vote by which the ratification of the thirteenth, four-

Results of, secured by constitutional amendment.

[1] See *supra*, § 586, and cases there cited; *supra*, §§ 380, 468.

[2] *Supra*, § 212.

teenth, and fifteenth amendments was secured. The constitutionality of the reconstruction legislation may be sustained on the following grounds:—

1st. *That of guaranty of a republican form of government.*— The "seceded" states, at the close of the late civil war, were, when it became the duty of congress to take action respecting them, under military control. The constitution of the United States guaranteed them a republican form of government, and this it was the function of congress to supply.[1]

2d. *That of state lapse*, it being assumed that the sovereignty of the country is in the states when in union, and that a state leaving the Union loses its rights as a state, and may be moulded by congress in the same way as may a territory.[2]

The difficulty in the way of this assumption, in the present connection, is the position taken by the supreme court of the United States, that the ordinances of secession were nullities, and that the "seceded" states were in fact never out of the Union.[3] Another difficulty is to be found in the improba-

[1] *Supra*, § 551.

[2] See *supra*, § 374, note, for an exposition of this view.

[3] *Supra*, § 373.

As sustaining this position, see Dr. J. C. Hurd's "Theory of our National Existence as shown by the Actions of the Government of the United States since 1881," cited *supra*, § 374, note.

It should be observed that the inconsistency in the reconstruction platform on which Dr. Hurd comments, *e. g.*, the treating the "seceded" states as belligerent enemies, and yet as all the time in the Union, may have grown necessarily out of the then condition of things, and is no greater than the inconsistency involved in the action of the convention parliament of 1688, which assumed: (1) that James II. was king, and was deposed; and (2) that he was not king, because he had abdicated.

The same apparent inconsistency, also, was exhibited both by parliament and king during the English civil war, and by king and congress in our own revolutionary struggle. Charles I. treated the parliamentary army as "belligerents," yet held that he was still sovereign of England; the parliamentary party treated the king's army as belligerents, but tried the king for treason. The British government during our revolutionary war recognized our army as belligerents, while it issued concurrent proclamations of amnesty and of exclusion from amnesty; we treated the "loyalists" as belligerents, and then tried them for treason, and confiscated their estates.

It is questionable whether contradictory positions of this class are not combined in all cases of civil war and reorganization. Waiving this, however, it may be said that in the case before us, although there are unquestionably *dicta* in which the "seceded" states are spoken of during the war as both in and out of the Union, yet

bility that it could ever have been meant, by the people of the United States, that a large portion of the country should, in any contingency, be reduced to a subjection to congress as absolute as is the subjection of Poland to Russia. The strain of such a burden both of power and of patronage would be more than the congress of the United States could bear.[1] Nor could the subjection, for any length of time, of one section to the other, fail to be fatal to the liberties of both. "If such subjection is to be maintained," so virtually argued Chatham, when it was proposed to keep the American colonies in absolute dependence on parliament, "the colonists in America will be the fit instruments to enslave Englishmen in England." What Chatham said then of the attempt to retain this country in subjugation to parliament may be said of the attempt of any one section to retain the other in subjugation to congress. The "reconstruction" rulings of the supreme court relieved us from this difficulty by denying that the power of congress over the "seceded" states was in this sense absolute.—The "seceded" states were still in the Union, and the interference of congress was sustained, not as a suppression of, but as a restoration of, their republican autonomy.

3d. *That of constitutional amendment.*—The thirteenth, fourteenth, and fifteenth amendments are assumed to have exercised a curative effect on prior legislation and executive action; and, however doubtful this may be as to matters which the amendments do not specifically ordain, they are, in any view, binding in respect to whatever is so ordained. It may be said that the ratification of the south to the amendments was coerced. But the answer is twofold: (1) The doctrine of coercion does not apply to political action.[2] If it did, no treaty that follows a war would stand, since there is no

these contradictions may be in a measure reconciled by assuming that the *states* remained in the Union, and that the belligerents were the *inhabitants* of the states, or a portion of such inhabitants. It may, however, be objected to this solution, that there are rulings to the effect that *all* the inhabitants of the "seceded" states were to be regarded *prima facie* as belligerent enemies. See *supra*, §§ 210, 217; Alexander's Cotton, 2 Wall. 404; The Hiawatha, 2 Blatch. 635.

[1] *Supra*, §§ 363 *et seq.*

[2] *Supra*, § 157.

such treaty that is not more or less coerced. (2) Even if the doctrine of coercion is applicable, it is a part of that doctrine that non-repudiation when the coercion is removed is ratification. And there can be no question that at least since 1872 all Federal military control of the south has been withdrawn, and that since the withdrawal of this control there is no southern state in which the constitutional amendments have not been treated as authoritative. Not only has there been no repudiation of them, but there have been in each state numerous statutory and judicial recognitions of their force. On this ground, if not on the first, may be sustained the rulings of the supreme court of the United States sustaining the reconstruction amendments.[1]

[1] As to the technical objections to the adoption of the amendments, see *supra*, § 400. In respect to the reconstruction proceedings, see Whiting's War Powers, 43d ed., App.

Mr. Lincoln's explanation of his action as to reconstruction is virtually the same as Mr. Jefferson's defence of his action in negotiating a treaty by which Louisiana and the adjacent territory were added to the domains of the Union, and the whole territorial character of the Union, therefore, materially changed. The annexation, so Mr. Jefferson said, may have been in exercise of a power not contemplated by the formal framers of the constitution, but this annexation was essential to the preservation of the country, and the treaty was to be executed, and the ceded territory taken possession of, subject to the future approval of the country either by an express amendment to the constitution or by tacit ratification. Mr. Lincoln took the same position with regard to his own action in resuming political relations with the seceded states. It is interesting, in comparing his letters and speeches in this connection, with those of Mr. Jefferson on the Louisiana purchase, to observe how both fall back on Burke's position that "circumstances" and "events," and not abstract speculations, are the forces which mould a country (see *supra*, §§ 27, 63, 365). Thus, in Mr. Lincoln's letter to Mr. Hodges, of April 4, 1864, he said: "I have never understood that the presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling (of disapproval of slavery). . . It was in the oath I took that I would to the best of my ability preserve, protect, and defend the constitution of the United States. . . . I understand, too, that in ordinary and civil administration *this oath even forbids me to practically indulge my primary abstract judgment on the moral question of slavery.* I had publicly declared this at many times and in many ways. And I aver that, to this day, I have done no official act in mere deference to my abstract judgment and feeling on slavery. I did understand, however, that my oath to preserve the constitution to the best of my ability imposed on me the duty of preserving, by every indispensable means, that government—that nation—of which the constitution was the organic law. . . I felt that measures

§ 594. It is essential, therefore, to remember in construing the "reconstruction" amendments be- Reconstruction amend-

otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the constitution through the preservation of the nation. Right or wrong I assumed this ground, and now avow it. I could not feel that to the best of my ability I had ever tried to preserve the constitution, if to save slavery, or any minor matter, I should permit the wreck of government, country, and constitution all together. . . . *I claim not to have controlled events, but confess that events have controlled me.* Now, at the end of three years' struggle, the nation's condition is not what either party or any man desired or expected." "I have been shown a letter," he said in an address three days before his assassination, "on this subject, in which the writer expresses regret that my mind *has not seemed to be definitely fixed on the question whether the seceded states, so called, are in the Union or out of it.* . . As yet, whatever it may hereafter become, that question is bad as the basis of a controversy, *and good for nothing* at all, *a merely pernicious abstraction.* . . I believe it is not only far easier to do this" (restore the old relations) "without deciding, or even considering, whether these states have ever been out of the Union than with (*sic*) it. Finding themselves safely at home, it would be utterly immaterial whether they had ever been abroad." That portion of Mr. Lincoln's message, of Dec. 1, 1862, which concludes with the words already cited, "we cannot escape history," is substantially a homely reproduction of the position of Burke already given, that a nation's present is moulded by its past, and not by "abstract theories."

In Mississippi *v.* Johnson, 4 Wallace, 475 (1866), Chief Justice Chase gave the opinion of the court as follows:—

"A motion was made, some days since, in behalf of the state of Mississippi, for leave to file a bill in the name of the state, praying this court perpetually to enjoin and restrain Andrew Johnson, president of the United States, and E. O. C. Ord, general commanding in the district of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of congress therein named.

"The acts referred to are those of March 2 and March 23, 1867, commonly known as the reconstruction acts.

"The attorney-general objected to the leave asked for upon the ground that no bill which makes a president a defendant, and seeks an injunction against him to restrain the performance of his duties as president, should be allowed to be filed in this court.

"This point has been fully argued, and we will now dispose of it.

"We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the president of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

"The single point which requires consideration is this: Can the president be restrained by injunction from carrying into effect an act of congress alleged to be unconstitutional?

"It is assumed by the counsel for the state of Mississippi, that the presi-

ments limit state interfer-

fore us, that while their temporary effect, now consummated, was to adjust the relations of the

dent, in the execution of the reconstruction acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

"A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

"The case of Marbury *v.* Madison, Secretary of State, 1 Cranch, 137, furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the secretary of state. It was held that the performance of this duty might be enforced by *mandamus* issuing from a court having jurisdiction.

"So, in the case of Kendall, Postmaster General, *v.* Stockton & Stokes, 12 Peters, 527, an act of congress had directed the postmaster general to credit Stockton & Stokes with such sums as the solicitor of the treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

"In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by *mandamus*.

"Very different is the duty of the president in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the president as commander-in-chief. The duty thus imposed on the president is in no just sense ministerial. It is purely executive and political.

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the president might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

"It was admitted in the argument that the application now made to us is

races at the close of the civil war, their permanent and continuing effect is to secure the people as

ence with private rights.

without a precedent; and this is of much weight against it.

"Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

"Occasions have not been wanting.

"The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of states and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular states. But no one seems to have thought of an application for an injunction against the execution of the act by the president.

"And yet it is difficult to perceive upon what principle the application now before us can be allowed, and similar applications in that and other cases have been denied.

"The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

"It will hardly be contended that congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the president?

"The congress is the legislative department of the government; the president is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance.

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the president refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the president complies with the order of the court and refuses to execute the acts of congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the house of representatives impeach the president for such refusal? And in that case could this court interfere, in behalf of the president, thus endangered by compliance with its mandate, and restrain by injunction the senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

"These questions answer themselves.

"It is true that a state may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the president in the performance of his official duties, and that no such bill ought to be received by us.

"It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson as president, it may be granted

such, without regard to race, from any unjust discrimination by the legislatures of their states.[1] By the first group of amend-

against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of congress by Andrew Johnson is relief against its execution by the president. A bill praying an injunction against the execution of an act of congress by the incumbent of the presidential office cannot be received, whether it describes him as president or as a citizen of a state.

"The motion for leave to file the bill is, therefore, denied."—On the question of the power of the courts to interfere with the political action of the executive, see *supra*, §§ 389 *et seq.*

In Georgia *v.* Stanton, 6 Wal. 50, the court, on an analogous question, spoke as follows:—

"The distinction (between political and judicial matters) results from the organization of the government into

[1] *Supra*, § 588. In R. R. Tax Cases, 13 Fed. Rep. 761, Sawyer, *J.*, said:—

"I shall not spend much time in discussing the question whether the fourteenth amendment applies only to the African race. Undoubtedly, the negro furnished the immediate occasion and motive for adoption of the amendment; but its benefits could not have been intended to be limited to the negro. The protection afforded is as important to others as to him, as is clearly shown by experience under this provision. A whole race, not African, large numbers of whom came to our shores under the solemn guarantees of stipulations in a treaty suggested and sought, and in a great part framed by ourselves, to promote our then supposed interests, were among the first to invoke this very provision of the fourteenth amendment to protect them, under the word 'person,' in the right to earn an honest living, by honest labor; and its protecting power was not invoked in vain. Parrott's Chinese Case, 6 Sawy. 349; *In re* Ah Chong (Chinese Fisherman Case), id. 451. Who, in view of past experience, shall say there was no occasion to extend the signification of the word 'person' beyond the negro? And are all other races, including our own, to be now withdrawn from its protecting power by so narrow and unnatural a construction. I apprehend not. If the line cannot be drawn at the negro, then no other can be adopted that will not embrace every human being in his individual character, or in his legal association with his fellows, for the more convenient administration of his property, and more successful pursuit of happiness. I apprehend that it would have struck the world with some astonishment, when this amendment was proposed to the people of the United States for adoption, if it had read: 'Nor shall any state deprive any person of the *negro race* of life, liberty, or property, without due process of law; nor deny to any person of the *negro race* within its jurisdiction the equal protection of the laws.' Yet so it must, in effect, be read if its operation is to be limited to that race. The rights of the negro, are, certainly, no more sacred or worthy of protection than the rights of the Caucasian or other races; and the security of the rights of corporations, and, through them, the rights of the real parties,—the corporators,—is as of great public importance as the security of any other private interests."

ments, embracing the first eleven, as has been already noticed, the people of the states, as well as the states themselves are

three great departments—executive, legislative, and judicial—and from the assignment and limitation of the powers of each by the constitution. The judicial power is vested in one supreme court, and in such inferior courts as congress may ordain and establish; the political power of the government in the other two departments. The distinction between judicial and political power is so generally acknowledged, in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. Nabob of Carnatic *v.* The East India Company, 1 Vesey, Jr., 371–393; S. C., 2 id. 56–60; Penn *v.* Lord Baltimore, 1 Vesey, 446–7; New York *v.* Connecticut, 4 Dallas, 1–6; The Cherokee Nation *v.* Georgia, 5 Peters, 1, 20, 29, 30, 51, 75; The State of Rhode Island *v.* The State of Massachusetts, 12 ib. 657, 733, 734, 737, 738.

"By the second section of the third article of the constitution, "the judicial power extends to all cases in law and equity arising under the constitution, the laws of the United States, etc., and, as applicable to the case in hand, to controversies between a state and citizens of another state," which controversies, under the judiciary act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction; and we agree that the bill filed presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, when the danger, actual or threatened, is irreparable, or the remedy at law inadequate; but according to the course of proceeding under this head, in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court either in law or equity.

"The remaining question on this branch of our inquiry is whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of congress, inasmuch as such execution would annul, and totally abolish, the existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state, by depriving it of all means and instrumentalities whereby its existence might, and otherwise would, be maintained. That these both, as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions and upon rights not of persons and property, but of a political character, will hardly be denied. For the rights, for the protection of which our authority is invoked, are the rights of sovereignty of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers

protected from any undue aggressions of the Federal government. But this was not enough. It became evident that

and privileges. No case of private rights or private property infringed or in danger of actual or threatened infringement is presented by the bill in a judicial form for the judgment of the court.

"Having arrived at the conclusion that this court, for the reasons above stated, possess no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants."

In Hickman *v.* Jones (9 Wall. 197) Swayne, J., giving the opinion of the court, said: "The rebellion out of which the war grew was without any legal sanction. In the eye of the law, it had the same properties as if it had been the insurrection of a county or smaller municipal territory against the state to which it belonged. The proportions and duration of the struggle did not affect its character. Nor was there a rebel government *de facto* in such a sense as to give any legal efficacy to its acts. It was not recognized by the national, nor by any foreign government. It was not at any time in possession of the capital of the nation. It did not for a moment displace the rightful government. That government was always in existence, always in the regular discharge of its functions, and constantly exercising all its military power to put down the resistance to its authority in the insurrectionary states. The union of the states, for all the purposes of the constitution, is as perfect and indissoluble as the union of the integral parts of the states themselves; and nothing but revolutionary violence can, in either case, destroy the ties which hold the parts together. For the sake of humanity, certain belligerent rights were conceded to the insurgents in arms. But the recognition did not extend to the pretended government of the confederacy. The intercourse was confined to its military authorities. In no instance was there intercourse otherwise than of this character. The rebellion was simply an armed resistance to the rightful authority of the sovereign. Such was its character in its rise, progress, and downfall. The act of the Confederate Congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted."

In Texas *v.* White, 7 Wall. 700 (decided in 1868), it was said by Chief Justice Chase:—

"Some not unimportant aid, however, in ascertaining the true sense of the constitution, may be derived from considering what is the correct idea of a state, apart from any union or confederation with other states. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

"It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes

the people of the states were in danger at least as much from the aggressions of their own legislatures as from the usurpa-

only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

"It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.

"This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. This was stated very clearly by an eminent judge in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.

"In the constitution the term state frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states under a common constitution which forms the distinct and greater political unit which that constitution designates as the United States, and makes of the people and states which compose it one people and one country.

"The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the states in respect to the making of treaties, emitting of bills of credit, and laying duties of tonnage, and which guarantee to the states representation in the house of representatives and in the senate, are found some instances of this use in the constitution. Others will occur to every mind.

"But it is also used in its geographical sense, as in the clauses which require that a representative in congress shall be an inhabitant of the state in which he shall be chosen, and that the trial of crimes shall be held in the state where committed.

"And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

"In this latter sense, the word seems to be used in the clause which provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion.

"In this clause a plain distinction is made between a state and the government of a state.

"Having thus ascertained the senses in which the word state is employed in the constitution, we will proceed to consider the proper application of what has been said." . . .

"Did Texas, in consequence of these acts, cease to be a state? Or, if not, did the state cease to be a member of the union?

"It is needless to discuss, at length, the question whether the right of a state to withdraw from the Union for any cause, regarded by herself as suffi-

tions of congress. No one can study the statute books of our states without seeing to how vast and pernicious an extent the

cient, is consistent with the constitution of the United States.

"The union of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the articles of confederation. By these the Union was solemnly declared to 'be perpetual.' And when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained 'to form a more perfect union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union, made more perfect, is not?

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the states. . . . And we have already had occasion to remark, at this term (The County of Lane v. The State of Oregon, 7 Wall. 76), that 'the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence;' and that 'without the states in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the states through their union under the constitution; but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the constitution, as the preservation of the Union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible union, composed of indestructible states.

"When, therefore, Texas became one of the United States, she entered into an indissoluble relation. . . . There was no place for reconsideration or revocation, except through revolution, or through consent of the states.

"Considered therefore as transactions under the constitution, the ordinance of secession, adopted by the convention, and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the state, as a member of the Union, and of every citizen of the state, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the state did not cease to be a state, nor her citizens to be citizens of the Union. If this were otherwise, the state must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of the rebellion, and must have become a war for conquest and subjugation.

"Our conclusion, therefore, is that Texas continued to be a state, and a state of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the national government, but entirely in accordance with the whole series of

private rights of individuals have been interfered with by state legislation; and no one who observes the way in

such acts and declarations since the first outbreak of the rebellion."

"But in order to the exercise, by a state, of the right to sue in this court, there needs to be a state government, competent to represent the state in its relations with the national government, so far, at least, as the institution and prosecution of a suit is concerned." . . .

"The obligations of allegiance to the state, and of obedience to her laws, subject to the constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of states and citizens to the Union. . . . All admit that, during this condition of civil war, the rights of the state as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the state, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion."

The opinion goes on to say that: "Where the national forces obtained control, the slaves became freemen," in this way limiting the effect of the president's proclamation of emancipation. The opinion then proceeds:—

"The new freemen necessarily became part of the people, and the people still constituted the state; for states, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the state, thus constituted, which was now entitled to the benefit of the constitutional guaranty." Id. 728.

"The legislature of Texas, at the time of the repeal, constituted one of the departments of a state government established in hostility to the constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful acts. And yet, it is an historical fact that the government of Texas, then in full control of the state, was its only actual government; and, certainly, if Texas had been a separate state, and not one of the United States, the new government having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during the whole period of its existence, as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

"It is not necessary to attempt any exact definitions, within which the acts of such a state government must be treated as valid or invalid."

The opinion concludes:—

"On the whole case, therefore, our conclusion is, that the state of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly." Id. 736.

Judge Grier, however, dissented, saying, among other things:—

"The original jurisdiction of this court can be invoked only by one of the

which state legislatures are chosen, the materials of which they are often composed, and the temptations to which they

United States. The territories have no such right conferred on them by the constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

"Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

"This is to be decided as *a political fact*, not as a *legal fiction*. This court is bound to know and notice the public history of the nation." Id. 737.

"It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the state's being in the Union; Dacotah is no state, and yet the courts of the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be states of the Union. Wherein does the condition of Texas differ from theirs?" Id. 738.

"I do not consider myself bound to express any opinion, judicially, as to the constitutional rights of Texas to exercise the rights and privileges of a state of this Union, or the power of congress to govern her as a conquered province, to subject her to military domination and keep her in pupilage. I can only submit to *the fact* as decided by the political position of the government, and I am not disposed to join in any essay to prove Texas to be a state of the Union, when congress has decided that she is not. It is a question of fact, I repeat, and of fact only. *Politically*, Texas is not *a state in this Union*. Whether rightfully out of it or not, is a question not before the court." Id. 739.

Judge Grier, on the technical question involved, thus speaks:—

"Having relied upon one fiction, namely, that she *is* a state in the Union, she now relies upon a second one, which she wishes the court to adopt, that she was not a state at all during the five years that she was in rebellion. She now sets up the plea of *insanity*, and asks the court to treat all her acts made during the disease as void.

"We have had some very astute logic to prove that, judicially, she was not a state at all, although governed by her own legislature and executive as 'a distinct political body.'

"The ordinance of secession was adopted by the convention, on the 18th of February, 1861; submitted to a vote of the people and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign act of a sovereign state, and the verdict on the trial of this question 'by battle,' as to her right to secede has been against her." Id. 740.

Judge Swayne also dissented, saying:—

"I concur with my brother Grier as to the incapacity of the state of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

"Upon the merits of the case, I agree with the majority of my brethren.

"I am authorized to say that my brother Miller unites with me in these views." Id. 741.

In White *v.* Hart, 13 Wall. 646, Swayne, J., said:—

"From the close of the rebellion

are generally subjected, can avoid feeling that they are not fit depositaries of the absolute power claimed for such bodies,

until Georgia was restored to her normal relations and functions in the Union, she was governed under the laws of the United States known as the reconstruction acts. Under these laws her present constitution was framed, adopted, and submitted to congress."

After a summary of the legislation culminating with the act of July 15, 1870 (16 U. S. Stat. 363), he says :—

"This act removed the last of the disabilities and penalties which were visited upon her for her share of the guilt of the rebellion. The condonation by the national government thus became complete." Id. 648.

On the point raised, that the "reconstruction" constitution of Georgia had been adopted under coercion, he says :—

"The third of these propositions is clearly unsound, and requires only a few remarks. Congress authorized the state to frame a new constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The state is estopped to assail it upon such an assumption. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it." . . . Id. 649.

He then proceeded :—

"The subject presented by the first proposition has been considered, under some of its aspects, several times by this court. We need do little more upon this occasion than to reaffirm the views heretofore expressed, and add such further remarks as are called for by the exigencies of the case before us.

"The national constitution was, as its preamble recites, ordained and established by the people of the United States. It created, not a confederacy of states, but a government of individuals. It assumed that the government and the Union which it created, and the states which were incorporated into the Union, would be indestructible and perpetual; and, as far as human means could accomplish such a work, it intended to make them so. . . . For all the purposes of the national government, the people of the United States are an integral, and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by state lines, for the purposes of state government and local administration. Considered in this connection, the states are organisms for the performance of their appropriate functions in the vital system of the larger polity, of which, in this aspect of the subject, they form a part, and which would perish if they were stricken from existence and ceased to perform their allotted work. The doctrine of secession is a doctrine of treason. . . . In some respects it [the rebellion] was not unlike the insurrection of a county or other municipal division of territory against the state to which it belongs. . . .

"The power exercised in putting down the late rebellion is given expressly by the constitution to congress. That body made the laws, and the president executed them. The granted power carried with it not only the

and that they should at least be placed under checks as stringent as those placed on congress by the first group of amend-

right to use the requisite means, but it reached farther, and carried with it also authority to guard against the renewal of the conflict, and to remedy the evils arising from it; so far as they could be effected by appropriate legislation. At no time were the rebellious states out of the pale of the Union. Their rights under the constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected, and remained the same. A citizen is still a citizen, though guilty of crime and visited with punishment. The political rights may be put in abeyance or forfeited. The result depends upon the rule, as defined in the law, of the sovereign against whom he has offended. If he lose his rights, he escapes none of his disabilities and liabilities which before subsisted. Certainly he can have no new rights or immunities arising from his crime. These analogies of the county and the citizen are not inapplicable, by way of illustration, to the condition of the rebel states, during the rebellion. The legislation of congress shows that these were the views entertained by that department of the government." . . . Id. 651.

"The different language employed in the two classes of cases evinces clearly that, in the judgment of congress, the reconstructed states had not been out of the Union, and that to bring them back into full communion with the loyal states, nothing was necessary but to permit them to restore their representation in congress. Without reference to this element of the case, we should have come to the same conclusion. But the fact is one of great weight in the consideration of the subject, and we think it conclusive upon the judicial department of the government." Id., citing Luther v. Borden, 7 How. 57.

Still more important are the opinions of the judges in Keith v. Clark, 97 U. S. 454. In this case, as we have seen, the question was as to the validity of a tender to a Tennessee tax collector, in payment of taxes, of notes issued by the State Bank of Tennessee, which had been issued after May 6, 1861. By Miller, J., the views of the majority are thus stated:—

"We are invited now to examine that point and to hold that as to all such notes the 12th section creates no valid contract." Id. 457.

"In entering upon this inquiry, we start with the proposition, that unless there is something in the relations of the state of Tennessee and the bank, after the date mentioned, to the government of the United States, or something in the circumstances under which the notes now sued on were issued, that will repel the presumption of a contract under the 12th section, or will take the contract out of the operation of the protecting clause of the Federal constitution, this court has established already that there was a valid contract to receive them for taxes, and that the law which forbade this to be done is unconstitutional and void.

"Those who assert the exception of these notes from the general proposition are not very well agreed as to the reason on which it shall rest, and we must confess that, as they are presented to us, they are somewhat vague and shadowy. They may all, however, as far as we understand them, be classed under three principal heads.

"1. The first is to us an entirely new proposition, urged with much earnest-

ments.[1] That such is the general sentiment is shown by the limitations which, in the last few years, have been imposed, in

ness by the counsel who argued the case orally for the defendant.

"It is, in substance, that what was called the state of Tennessee prior to the 6th May, 1861, became, by the ordinance of secession passed on that day, subdivided into two distinct political entities, each of which was a state of Tennessee. One of them was loyal to the Federal government, the other was engaged in rebellion against it. One state was composed of the minority who did not favor secession, the other of the majority who did. That these two states of Tennessee engaged in a public war against each other, to which all the legal relations, rights, and obligations of a public war attached. That the government of the United States was the ally of the loyal state of Tennessee and the confederated rebel states were the allies of the disloyal state of Tennessee. That the loyal state of Tennessee, with the aid of her ally, conquered and subjugated the disloyal state of Tennessee, and by right of conquest imposed upon the latter such measure of punishment and such system of law as it chose, and that by the law of conquest it had the right to do this. That one of the laws so imposed by the conquering state of Tennessee on the conquered state of Tennessee was this one, declaring that the issues of the bank during the temporary control of affairs by the rebellious state were to be held void; and that, as conqueror and by right of conquest, the loyal state had power to enact this as a valid law.

"It is a sufficient answer to this fanciful theory, that the division of the state into two states never had any actual existence; that, as we shall show hereafter, there has never been but one political society in existence as an organized state of Tennessee, from the day of its admission to the Union in 1796 to the present time. That it is a mere chimera to assert that one state of Tennessee conquered by force of arms another state of Tennessee, and imposed laws upon it; and finally, that the logical legerdemain by which the state goes into rebellion, and makes, while thus situated, contracts for the support of the government in its ordinary and usual functions, which are necessary to the existence of social life, and then, by reason of being conquered, repudiates these contracts, is as hard to understand as similar physical performances on the stage."

"2. The second proposition is a modification of this, and deserves more serious attention. It is, as we understand it, that each of the eleven states who passed ordinances of secession and joined the so-called Confederate States so far succeeded in their attempt to separate themselves from the Federal government that, during the period in which the rebellion maintained its organization, those states were in fact no longer a part of the Union, or, if so, the individual states, by reason of their rebellious attitude, were mere usurping powers, all of whose acts of legislation or administration are void, except as they are ratified by positive laws enacted since the restoration, or are recognized as valid on the principles of comity or sufferance.

"We cannot agree to this doctrine. It is opposed by the inherent powers

[1] Of the superiority of constituencies to legislatures, see *supra*, § 24.

most of our states, on the state legislatures by constitutional conventions,[1] and the still more effective limitation imposed by

which attach to every organized political society possessed of the right of self-government; it is opposed to the recognized principles of public international law; and it is opposed to the well-considered decisions of this court. 'Nations or states,' says Vattel, 'are bodies politic,' etc." . . .

"The political society which in 1796 became a state of the Union, by the name of the state of Tennessee, is the same which is now represented as one of those states in the congress of the United States. Not only is it the same body politic now: but it has always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a state of Tennessee, and the same state of Tennessee. Its executive, its legislature, its judicial departments have continued without interruption and in regular order. It has changed, modified, and reconstructed its organic law, or state constitution, more than once. It has done this, before the rebellion, during the rebellion, and since the rebellion. And it was always done by the collective authority and in the name of the same body of people constituting the political society known as the state of Tennessee.

"This political body has not only been all this time a state, and the same state, but it has always been one of the United States—a state of the Union. Under the constitution of the United States, by virtue of which Tennessee was born into the family of states, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the constitution, by reason of that force which in many other instances establishes for itself a status, which must be recognized as a fact, without reference to any question of right, and which in this case would have been, to the extent of its success, a destruction of that constitution. Failing to do this, the state remained a state of the Union. She never escaped the obligations of that constitution, though for a while she may have evaded their enforcement."

"These cases (White v. Hart and Texas v. White), and especially that of Texas v. White, have been repeatedly cited in this court with approval, and the doctrine they assert must be considered as established, in this forum at least." Id. 462.

"3. The third proposition on which the judgment of the courts of Tennessee is supported is, that the notes on which the action is brought were issued in aid of the rebellion, to support the insurrection against the lawful authority of the United States, and are, therefore, void for all purposes.

"The principle stated in this proposition, if the facts of the case come within it, is one which has repeatedly been discussed by this court. The decisions establish the doctrine that no promise or contract, the consideration of which was something done or to be done by the promisee, the purpose of which was to aid the war of the rebellion, or give aid and comfort to the enemies of the United States in the prosecution of that war, is a valid

[1] *Infra*, § 603; *supra*, § 491.

the clause before us. This clause, as has been already observed, cures what was previously the great defect of our

promise or contract, by reason of the turpitude of the consideration." . . . Id. 464.

"There is, however, nothing in the case before us to warrant the conclusion that these notes were issued for the purpose of aiding the rebellion, or in violation of the laws or the constitution of the United States. There is no plea of that kind in the record. No such question was submitted to the jury which tried the case. . . . We cannot infer, then, that these notes were issued in violation of any Federal authority. On the other hand, if the fact be so, nothing can be easier than to plead it and prove it. . . . To undertake to assume the facts which are necessary to their invalidity on this record is to give to conjecture the place of proof, and to rest a judgment of the utmost importance on the existence of facts not found in the record, nor proved by any evidence of which this court can take judicial notice." Id. 466.

The minority of the court (Waite, C. J., and Bradley and Harlan, JJ.), held that the action of the Bank of Tennessee, in issuing notes in support of the secession government, was invalid, and that consequently these notes could be repudiated.

Judge Bradley, in his dissenting opinion, p. 472, says:—

"In favor of the proposition that the lawful state government, reorganized after the rebellion, is bound to recognize the bills in question, it is contended that the state of Tennessee has always remained the same state; and that, unless it can be shown affirmatively that its acts and proceedings were intended to aid the prosecution of the rebellion, they are all valid and binding on the reconstructed state.

"The latter proposition I deny. The state can act only by its constituted authorities—in other words, by its government; and if that government is a usurping and illegal government, the state itself and the legal government which takes the place of the usurping government, are not bound by its acts. . . . Id. 474.

"I deny the assumption that the governments of the insurgent states were lawful governments. I believe, and hold, that they were usurping governments. I understand this to have been the opinion of the court in Texas *v.* White, 7 Wall. 700. The very argument in that case is, that whilst the state, as a community of people, remained a state rightfully belonging to the United States, the government of the state had passed into relations entirely abnormal to the conditions of its constitutional existence. 'When the war closed,' says Mr. Chief Justice Chase, speaking for the court, 'there was no government in the state except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the state. Many of the subordinate officers followed their example. Legal responsibilities were annulled or greatly impaired.' Again he says: 'There being, then, no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such government.' Again, in speaking of the power and duty of congress to guarantee to each state a

system. It destroys the power which had been assumed by state legislatures of interfering with private business, and of

republican government, and the necessary right which follows therefrom, to decide what government is established in each state, the chief justice makes the following quotation from the opinion of Mr. Chief Justice Taney, in the case of Luther *v.* Borden, 7 How. 1. . . .

"Mr. Chief Justice Chase proceeds to say: 'This is the language of the late chief justice, speaking for this court, in a case from Rhode Island, arising from the organization of opposing governments in that state. And we think that the principle sanctioned by it may be applied, with even more propriety, in the case of a state deprived of all rightful government by revolutionary violence, though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the state.'"

"The actual course of things taken in the seceding states, so fully detailed by the chief justice in Texas *v.* White, are demonstrative, it seems to me, of the position which I have assumed. The several state governments existing or newly organized at the times when the ordinances of secession were respectively adopted, assumed all the branches of sovereignty belonging to the Federal government. The right to declare war, etc., . . . were usurped by the said state governments, either singly, or in concert and confederacy with the others. They assumed to sever the connection between their respective communities and the government of the United States, and to exercise the just powers belonging to that government. That such governments should be denominated legal state governments in this country where the constitution of the United States is and ought to be the supreme law of the land, seems to be most remarkable. The proposition assumes that the connection between the states and the general government is a mere bargain or contract, which, if broken—though unlawfully broken—still leaves the state in rightful possession of all their pristine autonomy and authority as states.

"I do not so read the constitution of government under which we live. Our government is a mixed government—partly state, partly national. The people of the United States, as one great political community, have willed that a certain portion of the government . . . should be deposited in and exercised by a national government; and that all matters of merely local interest should be deposited in and exercised by the state governments. This division of governmental powers is fundamental and organic. It is not merely a bargain between states. It is part of our fundamental political organization. Any state attempting to violate this constitution of things not only breaks the fundamental law, but, if it establishes a government in conformity with its views, that government is a usurping government—a revolutionary government—as much so as would be an independent government set up by any particular county in a state. . . .

"I do not mean to say that states are mere counties or provinces. But I do mean to say that the political relation of the people of the several states to the constitution and government of the United States is such, that if a state government attempt to sever that relation, and if it actually sever it by

doing by law that which can be far better done by individual enterprise. And it goes as far as a constitutional limitation can go in establishing the principle, heretofore noticed as one of the first rules of liberal civilization, that government should not exercise functions which can be as well exercised by the people by themselves.[1] That which industry and enterprise can fairly win, arbitrary legislation is not to be permitted to take away.

assuming and exercising the functions of the Federal government, it becomes a usurping government.

"We have always held, it is true, that, in the interests of order and for the promotion of justice, the courts ought to regard as valid all those acts of the state governments which were received and observed as laws for the government of the people in their relations with each other, so far as it can be done without recognizing and confirming what was actually done in aid of the rebellion." Id. 476.

He adds, id. 478:—

"It is undoubtedly true that, when revolutions in governments occur, the new governments do often, as matter of policy, and to prevent individual distress among the citizens, assume the obligations of the governments to which they succeed. But this is done from motives of public policy only, and is not submitted to as a matter of absolute right. Such was clearly the relation of the lawful state governments to the obligations of the usurping governments at the close of the civil war in this country. They could assume them or not, as they saw fit."

"Whether the community of people constituting the several states remained states during the insurrection is of no consequence to the argument. The question is, whether the state governments were or were not legal governments, and whether the obligations by them assumed are binding upon the lawful government of the state.

"That the acts of secession were void, of course no one denies. The civil war was carried on by the United States to demonstrate their nullity. But neither has that anything to do with the question as to the validity of the state governments which waged war against the United States; except to make it more certain and indubitable that they were usurping governments." Id. 478.

"It seems to me, that the attempt to fasten upon the lawful government of Tennessee, an obligation to receive, as cash, bills that were issued under the authority of the usurping government of that state, whilst it was engaged in a deadly war against the government of the United States, is calculated to introduce evils of great magnitude; that it will ultimately lead to the recognition of the war debts of the seceding states, notwithstanding the prohibition of the fourteenth amendment of the constitution. But this I would regard as a far less evil than the establishment of doctrines at war, as I think, with the true principles of our national government, as well as with the established rules of public law."

[1] *Supra*, §§ 365, 588.

§ 595. The state rights school of expositors erred in holding that state sovereignty is vested, not in the people of the states, while remaining in the union, but in the legislative representatives of the states assembled in constitutional conventions, or in legislatures under the limitation of the state constitutions. The error was great, and its consequences have been serious. It led to the assumption (1) that constitutional conventions are absolute, and (2) that state legislatures are absolute, subject only to the limitations of the state constitution. Nor has this error, on its municipal side, been confined to those who claimed the right of secession. Courts which have been most strenuous in rejecting that claim have been equally strenuous in holding that within the orbit of state power, state legislatures, unless restrained by state constitutional limitations, are absolute. The ruling in the Dartmouth College Case, which has been already largely discussed,[1] so far from limiting the power of state legislatures, gave those legislatures powers more despotic than are held by any legislative body in the world. Under the Dartmouth College ruling a state legislature cannot, it is true, break a contract, but by granting a charter it may grant away irrevocably and in perpetuity franchises and privileges of illimitable value, and thus exercise, as we have seen,[2] power over future legislation which neither the British Parliament nor the congress of the United States is entitled to exercise. The mischief of vesting in the legislatures of the states this power of binding the people of the states forever has led, as has been noticed,[3] to the adoption, in almost all the states, of constitutions precluding the state legislatures from granting charters without the right of amendment or repeal. By this action, coupled with the rulings of the supreme court that the power of granting away franchises irrevocably does not extend to franchises whose common use is necessary to the community, the sphere of the authority of state legislatures has been greatly reduced. But a still greater and more bene-

This limitation more conducive to business security than the clause protecting contracts as construed in Dartmouth College Case.

[1] *Supra*, §§ 481 *et seq.*
[2] *Supra*, § 483.
[3] *Supra*, §§ 483, 491.

ficent reduction is effected by the amendment immediately before us. The sovereignty of the states is not in any way impaired by this amendment. But this sovereignty is placed, not in the legislature, but in the people. The people are hereby protected from the encroachments, not of the Federal government, for this is done by prior amendments, but of their legislatures. These legislatures cannot now deprive any persons of their rights without due process of law, and to this term a definite meaning has been already attached. There can be no unfair discrimination between persons. There can be no taking of any person's property without fair compensation.[1]

§ 596. When the Federal constitution went into effect, the sovereignty of the country was distributed as follows:—

These amendments do not disarrange, but make manifest the equipoises of the constitution.

I. *In the people of the states.* In them was vested, in accordance with the views above stated—

1st. The function of self-defence, self-protection, and self-support,[2] and the function of the determination of social rights and distinctions.

2d. The function of the instinctive spontaneous evolution of law in subordination to the sense of right and need, moulded by national traditions and environments.

3d. The function of electing such public officers as should be necessary to give form and effect to the laws thus evolved; such government to be in three departments: legislative, executive, and judicial, but without power to invade personal rights.

II. *In the government of the United States*, invested with enumerated powers, in the exercise of which it is supreme.

Such were the relations of the states, and of the United States at the time of the adoption of the Federal constitution, and so these relations exist at the present day. The two groups of amendments above noticed, the first limiting the powers of the Federal government in favor of the states and of the people; the second limiting the power of the state legislatures in favor of the people of the states, bring out in increased prominence the correlative sovereignty of the states

[1] *Supra*, § 566.

[2] *Supra*, § 27.

and of the United States. These piers, on which rest the composite structure of our government, were not created by the constitutional convention. They existed then and continue to exist from the nature of things; but though they were recognized by the formal framers of the constitution, it does not follow from this that this recognition was complete, or that these eminent men understood in its full meaning the message with which they were charged, and to which they gave expression. The despatches from the people, who are the primary law-makers, to their representatives, are sometimes, as we have seen,[1] in cypher, the meaning of which it takes time to bring out. When, for instance, the words "supreme," "post-roads," "treaty," "admiralty" were used, it was with an inadequate conception of the vast power with which they were charged. But this incompleteness of comprehension was not confined to the words used. Some of the ablest and most far-sighted of the members of the convention were unconscious both of the grandeur and of the perpetuity of the system; few were conscious of its marvellous adaptation to the permanent growth at once of personal liberty and of imperial power. The system, as we have seen, was declaratory of popular conditions;[2] but it does not follow from this that these conditions were fully understood at the time the convention met. But the great struggle that began in 1860 caused them to be plainly perceived. Statesmen of sagacity and of patriotism held, at least down to that era, to theories of the constitution, by which, on the one side, the sovereignty of the Union was lost in that of the states, or, on the other side, the sovereignty of the states was lost in that of the Union. The storm of the

[1] *Supra*, §§ 14, 19, 20, 21.

Mr. Bancroft, History of the Constitution, ii. 341, speaks of this popular action as the following by the people of "a mysterious and prophetic influence which arose from the heart," which made the people wiser than "their favorite statesmen."

[2] *Supra*, §§ 20, 356, 380.

As we have already seen (*supra*, §§ 356, 360, and see *infra*, § 612), the reasons given by legislators are not necessarily the reasons by which they are actuated when voting, and, even if this were not the case, the reasons operating on the legislator are not necessarily the reasons which produced the popular evolution of the law of which the formal expression adopted by the legislator is merely declaratory. The movement may be one which the legislator may not be able to resist,

civil war, however, swept away the mist, by which, to the eyes at least of politicians, the foundations of the structure

and yet which he may not be able to understand. Men trained to office, and experts in official acts, may not be the quickest to apprehend the relations of a measure to which they give formal shape. They act more or less under orders, which, from the peculiar structure of their minds, as contrasted with the mind of the people as a body, may be sealed to them. To adopt the language of Mr. G. T. Curtis, quoted above (*supra*, § 363, note), "the framers of the constitution were compelled to do this" (adopt its compromises), "or they could not otherwise have established any constitution at all." That some of them did not understand the meaning of the adjustments they made is plain. "The chances were almost infinite," said Gouverneur Morris, by way of illustrating the incapacity of the people to form a comprehensive and decided opinion in presidential elections, "against a majority of the electors in the same state" (Madison Papers, 362); and this view, so far as the subsequent remarks indicate, was generally accepted. "A popular election," said Mr. Gerry, of Massachusetts, who was always regarded as a democrat, "in this case" (that of presidential electors), "is radically vicious. The ignorance of the people would put it in the power of some one set of men, dispersed through the Union and acting in concert, to delude them into any appointment. He observed that such a society of men existed in the Order of the Cincinnati. They are respectable, united, and influential. They will, in fact, elect the chief magistrate in every instance if the election be referred to the people." (Ibid. 368.) Mr. George Mason, known as a Virginia strict constructionist, followed on the next day in the same line: "A popular election in any form," he said, "as Mr. Gerry has observed, would throw the appointment into the hands of the Cincinnati—a society for the members of which he had a great respect, but which he never wished to have a preponderating influence in the government." (Ibid. 368.) That the treaty- and state-making functions would be hereafter regarded as including the power to annex vast territories, far greater in area than the original Union, none of the members of the convention apparently conceived; the remarks of all who spoke on these clauses are confined to the lands east of the Mississippi, owned by the states then existing. The comprehensive character of the word "post-roads" came within a few votes of being destroyed by the addition of an amendment, proposed by Dr. Franklin and Judge Wilson, authorizing congress to "cut canals where deemed necessary;" in this way giving a power which would be of no ultimate use, and excluding thereby powers which, as in the case of the great Pacific Railroad, have proved to be essential. (p. 543.) Of the adaptation of the constitution, framed by the convention for the purposes of a government both strong and free, few had any conception. Even Hamilton, usually singularly sanguine, said that "he had been restrained from entering into the discussions by his dislike of the scheme of government in general" (ibid. 517); and, just before signing, he said: "No man's ideas were more remote from the plan than his were known to be; but is it possible to deliberate between anarchy and convulsion on

were hid. For it was then shown that there could be no division of the Union without civil war, and no civil war without a reunion in which the coördinate rights of the people of the states and of the United States should be recognized as perpetual. But this coördination of sovereignties is not the only great fact which the war-era disclosed as inherent in our system. (1) It disclosed, in addition, the imperial grandeur of the United States. As long as the true nature of the Union was obscured, it had comparatively little foreign influence, since it was looked upon as a league which might at any time dissolve. The exhibition of the fact that the Union is indissoluble, is, as we have seen,[1] the exhibition of a degree of national power and wealth which places the United States in the first rank of empires, and which gives her not only in the position of her citizens, but in her influence in international counsels, a weight proportionate to that high rank. (2) It disclosed the true relation of the people of the states to their governments. It was in defiance of all the traditions and convictions of the people that they were placed under the unbridled control of the legislation of the states. The incapacity of state legislatures to destroy personal rights is now as fully manifested, as, at the time of the adoption of the first group of amendments, was the incapacity of congress to destroy personal rights. (3) While thus disclosing the immutability of Federal and state sovereignties, and the

one side, and the chance of good to be expected from the plan on the other?" (Ibid. 556.) Jay was one of the members of the New York convention by which the constitution was ratified, and united with Hamilton and Madison in the preparation of the Federalist; yet Jay, when secretary of foreign affairs, urged, with the assent of a majority of the confederate congress, at the very period when the constitution was before the states for consideration, the cession of the control of the Mississippi River to Spain. It was by this action more than by any other cause that the ratification of the constitution was imperilled in Virginia; and nothing exhibits more clearly the superiority of popular instinct as a motive power to political speculation than the fact that the people of the entire country, north as well as south, agreed in denouncing such a cession. Congress sullenly receded, and the negotiations were abandoned. Scarcely twelve years had elapsed before, by the cession of Louisiana by Spain to France and then by France to the United States, the United States took possession not only of the Mississippi River, but of the Mississippi Valley.

[1] *Supra*, §§ 134, 588.

limitation of legislative power, both Federal and state, time has also disclosed the self-developing capacity of these sovereignties each in their particular spheres. The factors remain constant in their relations; each of them, however, grows in its department. There is immutability in the demarcation of these sovereignties; there is not only mutability, but perpetual growth in the exercise of each sovereignty. There is nothing strange in this. The more fully the coherence of men in society is recognized the more fully is recognized the self developing power of each individual man. So it is with the coördinate sovereignties existing indissolubly in this country. There has been evolved, for instance, in the people of the states, taking them individually, powers not conceived of at the framing of the constitution. There is not a person, no matter how obscure, in the most recently settled of our states, who has not open to him innumerable avenues of activity and of happiness which were unknown, even to the most wealthy and prosperous, in 1787. There is not a state, no matter how recently admitted to the Union, that cannot now, through its mines or its crops, move the markets of the world more perceptibly than could the whole Union in 1787. And there is not a state whose constitution does not contain general powers of legislation which, as has been the case with the power to establish schools, have not been found, as time flows on, to cover multitudes of objects which were not thought of when the powers were first given. And eminently has this been the case, as we have seen, with the constitution of the United States. The equipoise between state and Federal sovereignties continues substantially the same, yet the enumerated powers of the Federal government include a multitude of incidents not even imagined in 1787.[1] The post-boy, passing twice a week between Boston and New York, has been succeeded by railroad-trains going twice a day between New York and San Francisco. Lines of railroad and lines of shipping have become so continuous that the regulation of international and interstate commerce covers now the land as much as it once covered the sea. The words "new states," in

[1] See *supra*, § 380.

the clause for the admission of "new states into the Union," comprehended, in the eyes of those who transcribed it in this connection, only such states as should be framed from the territory then owned by the existing Union; it now comprehends a territory much larger than the whole of that Union as it then existed.[1] The word "treaty" comprehends the process by which may be acquired illimitable territories to be thus carved up into states. The word "admiralty" no longer represents, as it did to the framers of the convention, and as it still does in England, jurisdiction over the high seas; it now, in the United States, takes within its scope lakes, rivers, and canals wherever interstate or foreign commerce extends.[2] The growth of credit, of wealth, and of population, has put within the control of the United States government military resources which, now that they have been once and finally displayed, will enable it not only to preserve hereafter its own territory intact, but to defy foreign aggression. Yet, with all this, the equipoise remains; the states retain their sovereignty, while the United States government is supreme in its allotted sphere. We have in this the combination of the two great factors by which alone can stable liberal governments be secured. The first of these is the guaranty of local and personal liberty, and the distribution of sovereignty in such territories as tradition or policy may set apart. The second is the illimitable evolution of power by the several possessors of sovereignty in their prescribed departments.[3] In this way the principles vindicated in the prior pages are combined. On the one side, there is constancy in the relation of the factors of government; on the other side, the powers of these factors are evolved by the silent and spontaneous, yet salutary and potent, action of the people applying their capacities to their opportunities.[4]

[1] *Supra*, § 462.
[2] See *supra*, § 523.
[3] See *supra*, § 380.
[4] *Supra*, §§ 14–17. As to evils consequent on disturbance of constitutional equipoise, see *supra*, § 377.

CHAPTER VII.

STATUTES.

Statutes are at common law public or private, § 598.
Statutes classified as enabling, enlarging, restraining, and disabling, § 599.
And so as declaratory or corrective; as penal or remedial; as imperative or directory, § 600.
Legislative functions cannot be transferred to people; otherwise as to special matters calling for popular advice, § 601.
Statutes take effect from day of executive approval, § 602.
Statutes must follow constitutional limitations as to entitling, as to cumulation, and as to enactment, § 603.
Construction to be distinguished from interpretation, § 604.
In this country construction modified by the existence of constitutional limitations, § 605.
Presumption in favor of constitutionality, § 606.
Statutes may be unconstitutional in part, § 607.
Injustice and impolicy no ground for avoiding statute, § 608.
Rights not to be taken away except by express enactment, § 609.
Statutes not to be construed as retrospective, § 610.
Motives of legislators not admissible, but meaning to be gathered from words, § 611.
And from national antecedents and conditions, § 612.
Authoritative exposition to be followed, § 613.
Literal meaning when reasonable to be taken, § 614.
When construction is in doubt, the fairest and most beneficial preferred, § 615.
Common law and other statutes to be taken into consideration, § 616.
Common law may help out statute, § 617.
Penal statutes to be strictly construed, § 618.
So of grants of franchises, § 619.
Prohibition implies penalty, and penalty prohibition, § 620.
Titles may explain object, § 621.
Preamble not conclusive, § 622.
Repeal of prior statutes may be implied as well as express, § 623.
Statutes may become obsolete, § 624.
Codes or statutes may absorb prior statutes or common law, § 625.
Statutes may be cumulative, § 626.
At common law repeal of repealing statute revives original statute, § 627.
When clauses conflict, last clause is operative, § 628.
Division in sections has no logical effect, § 629.
Statutes depend on judiciary for recognition, for comprehension, for application, and for enforcement, § 630.

Statutes are at common law either public or private.

§ 598. STATUTES, at common law, are either public, relating to matters concerning the public generally, or private, concerning exclusively private interest.[1] The distinction is principally of interest from the fact that by the old law the courts took judicial notice of public but not of private statutes. In England the distinction has been done away with by the act of 13 and 14 Vict., c. 21, which provides that after 1850 all statutes are to be regarded as public, and are to be judicially noticed, unless the contrary be therein expressly declared. By the old law, also, a distinction was taken to the effect that a private statute does not bind strangers, whereas a public statute binds all the world, and this is declared by Chancellor Kent to be "a safe and just rule of construction,"[2] and the distinction has been adopted in New York.[3] It has also been held that private statutes must be specially pleaded, which is not the case with public statutes. But in jurisdictions where all statutes are held to be public these distinctions vanish; and they have been held not to exist in cases where statutes, nominally private, are made by their terms to affect the community generally.[4]

[1] *Supra*, § 13.

[2] Kent's Com., i. 466; Lucy *v.* Levington, 1 Vent. 175.

[3] Jackson *v.* Catlin, 2 Johns. 48; 8 Johns. 520; McKinnon *v.* Bliss, 21 N. Y. 206; *supra*, § 13.

[4] Edinburgh R. R. *v.* Wauchope, 8 Cl. & F. 710. That a state statute legalizing elections held by the voters of a county as to liability on negotiable bonds is public, and therefore need not be specially pleaded, see Unity *v.* Burrage, 103 U. S. 447. As to judicial notice, see Whart. on Ev., §§ 276 *et seq.*

"Private acts," says Mr. Sedgwick (Stat. Law, p. 27), "do not bind or conclude third parties or strangers; and they are not bound to take notice of a private act, though there be no general saving clause of their rights. Lucy *v.* Levington, 1 Vent. 175; Kent Com., J. P., 459; Dwarris, vol. ii. p. 471; Barington's Case, 8 Rep. 136*b*; Jackson Catlin, 2 Johns. 48; S. C., 8 Johns. 520. In England it is held that words of a statute applying to private rights do not affect those of the crown. This principle is well established, and is there considered indispensable to the security of the public rights. It has been recognized also in this country; and on this ground it was held in Pennsylvania in regard to Windmill Island in the Delaware River opposite Philadelphia, though it was claimed under a legislative grant, that as the rights of the commonwealth were not ceded by the act, no title was acquired as against the state. Jones *v.* Tatham, 20 Penn. R. 398. But in this country generally, I should doubt whether this construction could be safely assumed as a uni-

§ 599. Statutes, also, are divided into enabling, enlarging restraining, and disabling.[1] An enabling statute is one giving power; an enlarging statute one extending power already given; a restraining statute is one limiting power; a disabling statute is one by which power is taken away, or its existence extinguished. It is obvious that this division, instead of exhausting the category of statutes, merely enumerates the characteristics of certain statutes, leaving others undesignated.

Classification of statutes as enabling, enlarging, restraining, or disabling.

§ 600. Nor is the division into statutes declaratory, penal, and remedial more satisfactory. A *declaratory* statute is one which declares the common law, and which in no way undertakes to modify that law. Such statutes, it is said, are less common in England in late years than they were in former years. In this country they are not uncommon in cases in which, some doubt existing as to what the law is, the legislature undertakes to clear that doubt by passing a declaratory statute,[2] and under this head may be mentioned statutes to clear clouds, to use the common designation, from titles. Statutes not distinctively declaratory may be termed "corrective," or "innovative."[3] A *penal* law is one imposing a

And so as declaratory or corrective; as penal or remedial; as imperative or directory.

versal rule. . . . . Where the terms of an act are sweeping and universal, I see no good reason for excluding the government, if not specially named, merely because it is the government."

[1] Steph. Com., 8th ed., i. 70.

[2] That such statutes cannot change the law as to vested rights, see *supra*, §§ 478 *et seq.*

[3] Mr. Sedgwick (Stat. Law, 28) uses the term "innovating" as descriptive of laws that are not declaratory. "It will be borne in mind," he says, "that the earliest legislators found a great body of law established under cover and color of custom. Such rules are now growing up every day around us. When the attention of the law-making power is turned to new subjects, and a law is enacted in regard to them, defining rights or imposing prohibitions which are new to the statute book, it often becomes a question whether the new law is declaratory of the old, or whether it is intended to introduce any new principle. In this latter case, as I have said, for want of a settled terminology, I call it innovating. Thus, for instance, to give an idea of a declaratory act, an old English law, 25 Edward III. 2, De natis ultra mare, recites, 'Because that some people be in doubt if the children born in parts beyond the sea, out of the allegiance of England, should be able to demand inheritance within the same allegiance or not,' and then goes on to en-

penalty.[1] *Remedial* statutes are statutes undertaking either to remove some hardship in the existing law or to correct some defect in its structure. But not only are there many statutes which do not fall under any one of these divisions, but no one of them is exclusive of the others. A declaratory statute, as is the statute in Pennsylvania dividing murder into degrees, may be declaratory in stating what the legislators believe the old law to be, remedial in correcting that law, and penal in imposing a punishment either the same or different from that the old law imposed.—*Directory* statutes, or, to speak more precisely, directory clauses in statutes, are clauses which are regarded as merely indicating the mode of a procedure or prescribing penalties for the non-pursuance of such mode, without making invalid the procedure if not conducted in the way indicated. "The general rule is, that the prescriptions of a statute relating to the performance of a public duty are so far directory, that though neglect of them may be punishable, yet it does not affect the validity of the acts done under them; as in the case of a statute requiring an officer to prepare and deliver a document to another officer, on or before a certain day."[2] *Imperative* (or mandatory) statutes,

act that the children of subjects born abroad be deemed liege subjects of the English crown. And it has been held that this does not establish any new rule, but that the act was merely a declaratory statute, and that the rule was the same at common law; Dyers's Reports, 224 *a;* Bacon *v.* Bacon, Cro. Car. 601; Doe dem Thomas *v.* Acklam, 2 B. & Cres. 779; Lynch *v.* Clarke, 1 Sandf. Ch. R. 583, 660; 2 Kent, Com., 50, 51. Declaratory acts, says Mr. Dwarris, vol. ii. p. 43, are made when the old custom of the kingdom is almost fallen into disuse, or become disputable, in which case the parliament thinks proper in perpetuum rei testimonium, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Declaratory acts are also passed to explain doubts in previous statutory provisions, and they are then what the old writers on the Roman law called acts of authentic interpretation."

That the legislature has no power to declare the meaning of an existing statute, so as to affect vested rights, see People *v.* Supervisors, 16 N. Y. 424; Reiser *v.* William Tell As., 39 Penn. St. 137; Trask *v.* Green, 9 Mich. 358, 366; but see Savings Bank *v.* Allen, 28 Conn. 97; Tilford *v.* Ramsey, 43 Mo. 410. That a declaratory resolution cannot give a binding construction to the constitution, see Calhoun *v.* McLendon, 42 Ga. 405.

[1] That penal laws are construed strictly, see *infra*, § 618.

[2] Sweet's Law Dic., citing Maxwell on Statutes, 330.

on the other hand, are statutes making a particular mode essential to the validity of the procedure.[1] And as imperative have been construed the series of constitutional and statutory provisions, to be hereafter noticed, prescribing certain forms as essential to valid legislation.[2] Whether a statutory provision is imperative or directory is to be determined: (1) from the general structure of the statute, and (2) from the object which the statute is designed to effect. If this object be one involving questions of morals or public policy, then its prescriptions, the construction being in other respects doubtful, are to be regarded as peremptory. It is to be observed, also, that a statute may be peremptory in one relation and directory in another, as is the case in respect to the statutes prescribing certain forms for the marriage ceremony. The omission of these forms, in those states where they are regarded as simply directory, though exposing the parties concerned in the omission to a suit for penalties, does not invalidate the marriage. The most difficult questions in this line, however, are those which arise when a statute provides that a certain act "shall" be done by courts, executive, or other government functionaries. Perhaps the conflict in the cases may be reconciled by assuming that when the legislature deals with executive or judiciary, which are coördinate powers, "shall" is to be regarded as directory, while it may be regarded as imperative when addressed to functionaries subordinate to the legislature.[3]

[1] Wilberforce on Stat., 193; Sedgwick on Stat. Law, 316-318.

[2] *Infra*, § 603.

[3] *Supra*, § 388; Wilberforce on Stat., 194 *et seq.*, where the question is discussed; and see Norwegian Street, *in re*, 81 Penn. St. 349; Ah Fook, *ex parte*, 49 Cal. 402.

In an early English case, it appeared that the mayor of a town was to be chosen out of the aldermen who were "annuatim eligend," but it also appeared that the aldermen present at the mayor's election had been in office several years, and none of them had been re-elected within a year. The king's bench held the election void; but upon error in the exchequer chamber and two solemn arguments the judgment was reversed, and the words "annuatim eligend" were held to be directory only; and the reversal was affirmed in parliament. Foot *v.* Prowse, Mayor de Truro, Strange, 625, 11 George I. In R. *v.* Corporation of Durham, 10 Mod. 146, 147, the court said that though a town clerk be annuatim eligibilis, he remains town

§ 601. When the constitution of a state deposits the law-making function in the hands of a legislature, the legislature can no more transfer this function to the people as a body than it can to the executive.[1] Hence it has been frequently held that it is unconstitutional for the legislature to leave to popular vote matters which it is incumbent on itself to discuss and decide.[2] No department of government can be permitted in this way to divest itself of its distinctive duties.[3] On the other hand, when the opinion of a particular community is an important factor in determining the propriety of a proposed law, there is no good reason why an election should not be had for the purpose of ascertaining what such opinion is.[4] This is peculiarly

Legislative functions cannot be transferred to people; otherwise as to special matters calling for popular advice.

clerk after the year, and until another be chosen; but if he had been eligibilis pro uno anno tantum, his office would have expired at the end of the year; and see R. *v.* Loxdale, 1 Burr. 445; Entwistle *v.* Dent, 1 Exch. 812. As to the different effect of affirmative or negative words in making a statute imperative or directory, may be consulted Savage *et al. v.* Walshe *et al.*, 26 Alabama, 619; Rex *v.* Justices of Leicester, 7 B. & C. 6; S. C., 9 D. & R. 772.

In determining the question between a directory and imperative (or mandatory) construction, two opposite extremes are to be avoided. On the one side, we are not justified by declaring a law directory, in striking at the object of the law. "I am not very well satisfied with the summary mode of getting rid of a statutory provision, by calling it directory," says Hubbard, J., in the supreme court of Vermont. "If one positive requirement and provision of a statute may be avoided in that way, I see no reason why another may not." Briggs *v.* Georgia, 15 Verm. 61, 72. On the other side, we must remember that by treating a law as mandatory, we may be sacrificing the real to the formal object of the law.

[1] *Supra*, § 394.

[2] Sedgwick, Stat. Law, 134-5; State *v.* Parker, 26 Vt. 357; Barto *v.* Himrod, 4 Seld. 483; Bank of Rome *v.* Rome, 18 N. Y. 38; Clarke *v.* Rochester, 24 Barb. 446; Morgan *v.* Plank Road, 2 Dutcher, 99; Com. *v.* Painter, 10 Penn. St. 214; People *v.* Collins, 3 Mich. 343; Peck *v.* Weddell, 17 Ohio St. 271; Smith *v.* Janesville, 26 Wisc. 291; State *v.* Field, 17 Mo. 529. This has been held as to general school laws, Thorne *v.* Cramer, 15 Barb. 112; Barto *v.* Himrod, 4 Seld. 483; and to general excise laws, Parker *v.* Com., 6 Barr, 507; and see Petition of Fifty Taxpayers, 25 Pitts. L. J. 146.

[3] *Supra*, § 394; Parker *v.* Com., 6 Barr, 507; Meshmeier *v.* State, 11 Ind. 482; People *v.* Salomon, 46 Ill. 333; Wall, *ex parte*, 48 Cal. 279.

[4] State *v.* Wilcox, 42 Conn. 364; Locke's App., 72 Penn. St. 491; Anderson *v.* Com., 13 Bush, 485.

the case when the question is whether a municipal corporation should be permitted to authorize a certain loan;[1] or to adopt certain police restrictions.[2] It has also been held that the legislature can leave it to the people distinctively interested to decide whether there shall be a school law in a particular district;[3] or whether a county seat is to be changed;[4] or a district be divided or consolidated.[5] And it has even been held that, on matters relating to the state as a whole, the opinion of the people of the state can be taken when such an opinion is an important element in determining the propriety of such legislation.[6] Thus, when the question is whether a constitutional convention shall be called, it is not unusual, even where the constitution in force contains no such provision, to appeal to the people for a vote to determine as to the calling of such a convention.[7] But the prevailing opinion is that the question whether the sale of spirituous liquors should be prohibited or licensed, is one which is to be determined by considerations of which the legislature is the proper judge, and which should not be submitted to the people.[8] Nor can the question of the repeal of a general law be submitted to popular vote.[9]

[1] Call *v.* Chadbourne, 46 Me. 206; Starin *v.* Genoa, 23 N. Y. 439; State *v.* Wilcox, 45 Mo. 458.

[2] Dalby *v.* Wolf, 14 Iowa, 228.

[3] Bull *v.* Read, 13 Gratt. 78.

[4] Com. *v.* Painter, 10 Penn. St. 214.

[5] People *v.* Reynolds, 5 Gilm. 1; Smith *v.* M'Carthy, 56 Penn. St. 359; People *v.* Nally, 49 Cal. 478; see State *v.* Elwood, 11 Wisc. 17.

[6] Bull *v.* Read, 13 Gratt. 78.

[7] *Supra*, §§ 368-9.

[8] Parker *v.* Com., 6 Barr, 507; Rice *v.* Foster, 4 Harr. (Del.) 479; Meshmeier *v.* State, 11 Ind. 482; though see, *contra*, Hammond *v.* Haines, 25 Md. 541.

[9] Parker *v.* Com., 6 Barr, 507; State *v.* Weir, 33 Iowa, 134.

On the question in the text we have the following note, by Prof. Pomeroy, to the second edition of Sedgwick on Damages, p. 135: "Statutes creating municipal corporations, or imposing liabilities upon municipalities, or authorizing municipalities to incur debts and obligations, or to make improvements, may be referred to the popular vote of the districts immediately affected; in other words, the people of such districts may decide whether they will accept the incorporation, or will assume the burdens. This doctrine may be considered the settled law of the whole country, and the same principle has frequently been applied in the case of other and similar local measures. Bank of Rome *v.* Rome, 18 N. Y. 38; Starin *v.* Genoa, 23 N. Y. 439; Clarke *v.* Rochester, 28 N. Y. 605; Bank of Chenango *v.* Brown, 26 N. Y. 467; Corning *v.* Greene, 23 Barb. 33;

§ 602. In England a statute goes into operation, unless there be some other restriction, at the time it receives the sovereign's assent.[1] In this country the time of such operation varies with the limitations of the constitution. Under the constitution of the

Statutes operate from time designated by constitution.

Grant *v.* Courter, 24 Barb. 232; Robinson *v.* Bidwell, 22 Cal. 379; Hobart *v.* Supervisors, 17 Cal. 23; Williams *v.* Cammack, 27 Miss. 209; Alcorn *v.* Hamer, 38 Miss. 652; Call *v.* Chadbourne, 46 Me. 206; State *v.* Wilcox, 45 Mo. 458; State *v.* Scott, 17 Mo. 521; Smith *v.* McCarthy, 56 Penn. St. 359; Commonwealth *v.* Painter, 10 Penn. St. 214; San Antonio *v.* Jones, 28 Tex. 19; Louisville R. R. *v.* Davidson, 1 Sneed, 637; State *v.* O'Neil, 24 Wis. 149; Cotten *v.* Sion Co., 6 Flor. 610.

"A law establishing free schools in a particular district, made to depend as to its going into effect on the vote of such district, was upheld in Bull *v.* Read, 13 Gratt. 78. The same doctrine has been held of any local law. Hobart *v.* Supervisors, 17 Cal. 23; People, *ex rel.* Wilson, *v.* Salomon, 51 Ill. 38. And even of a law affecting the whole state. Smith *v.* Janesville, 26 Wis. 291. An act amending a city charter, and going into effect as a whole independently of assent, but requiring assent as to certain sections before they were to be acted upon, is valid. Clarke *v.* Rochester, 28 N. Y. 605; 24 Barb. 446.

"*À fortiori*, a grant of power to do certain acts upon obtaining the consent of specified persons, is valid. Morgan *v.* Monmouth Pl. R. Co., 2 Dutch. 99. The following are instances in which statutes, providing for a submission to the popular vote of the localities affected, have been sustained: Providing for the change and location of a county seat, Commonwealth *v.* Painter, 10 Penn. St. 214; for the uniting specified towns or districts, Commonwealth *v.* Judges, 8 Penn. St. 391; Call *v.* Chadbourne, 46 Me. 206; for the division of a county or town, People *v.* Reynolds, 5 Gilm. 1; for a tax to be laid upon a district for the purpose of constructing levees, Alcorn *v.* Hamer, 38 Miss. 652.

"A license law depending for its going into effect in any county upon the popular vote of such county is invalid. State *v.* Swisher, 17 Tex. 441; Geebrick *v.* State, 5 Clarke (Ia.), 491; Parker *v.* Commonwealth, 6 Penn. St. 507; Rice *v.* Foster, 4 Harr. (Del.) 479; State *v.* Weir, 33 Iowa, 134; and the same where the vote was to be by towns. Meshmeier *v.* State, 11 Ind. 482; Maize *v.* State, 4 Ind. 342; but see Hammond *v.* Haines (25 Md. 541), where a statute allowing a particular municipality to determine by popular vote whether such licenses should be granted therein was sustained.

"Where the constitution provided that places for holding courts should be 'provided by law,' and the legislature enacted that they should be held at the county seat, and then gave the counties the power to choose their county seats, this was held to be in compliance with the constitution. Upham *v.* Supervisors, 8 Cal. 378.

"A statute submitting to the people of several municipalities the question whether they should be consolidated is valid. Smith *v.* M'Carthy, 56 Penn. St. 359."

[1] This is under 33 Geo. III. c. 13; Atty.-Gen. *v.* Parnther, 1 Bro. C. C. 409.

United States a statute takes effect from the time it is signed by the president; or, in case of a veto, on its passage by the requisite constitutional majority; or, in case of a veto not being sent in and want of signature, ten days after the passage of the bill.[1] If, however, congress adjourns before the expiration of the ten days after the passage of the bill, then it fails to be a law unless signed.[2] In many states there are similar limitations. But in other states a statute does not take effect until its publication.—Supposing there is no constitutional nor statutory limitation, the prevalent opinion is that a statute takes effect from the beginning of the day in which it receives the executive sanction;[3] or, under the Federal and most state constitutions, at the expiration of ten days from its passage, unless congress has intermediately adjourned. But when the question arises as to whether a statute affects an act committed on the same day, it is admissible to prove by parol what was the hour when the statute actually took effect.[4] In several jurisdictions, however, provisions exist specifying the period at which statutes go into operation.[5]

§ 603. Of recent years additional checks on legislation have been introduced by constitutional limitations designed to prevent improvident legislation.[6] These checks may be classified as follows:—

Statutes must follow constitutional limi-

[1] See *supra*, §§ 398, 512; The Brig Ann, 1 Gall. 62, is an illustration of the hard way this rule sometimes works.

[2] A bill becomes a law in Illinois if signed by the governor after the adjournment of the legislature, although the legislature had adjourned *sine die* before such signature. Seven Hickory *v.* Ellery, 103 U. S. 423.

[3] Matthews *v.* Zane, 7 Wheat. 167; Lapeyre *v.* U. S., 17 Wall. 191; Taylor *v.* State, 31 Ala. 383; see Barry *v.* Viall, 12 R. I. 18.

[4] Gardner *v.* Collector, 6 Wall. 499; Wynne, *in re*, Chase, Dec. 227; Richardson, *in re*, 2 Story, 571.

[5] Cooper *v.* Curtis, 30 Me. 488; Barry *v.* Viall, 12 R. I. 18.

[6] That the Federal courts will follow in such matters the construction of state courts, see *supra*, § 382; and see Montclair *v.* Ramsdell, 107 U. S. 147; Read *v.* Plattsmouth, 107 U. S. 568; Oregon Co. *v.* Rathburn, 5 Sawyer, 32; Sackett, etc., Streets, 74 N. Y. 95; One Hundred and Thirty-eighth Street, *in re*, 60 How. (N. Y.) Pr. 290; Payne *v.* Mahon, 41 N. J. L. 292; Union Pass. R. R. Appeal, 81* Penn. St. 91; Keller *v.* State, 11 Md. 525; Dorchester Co. *v.* Melkins, 50 Md. 28; State *v.* Fox, 51 Md. 412; Luehrman *v.* Taxing Dist., 2 Lea (Tenn.), 425; St. Louis *v.* Green, 7 Mo. App. 468; Hill *v.* Decatur, 22 Ga. 203; King *v.* Banks, 61 Ga. 20; Weaver *v.* Lapsley, 43 Ala. 224;

tations as to entitling, as to cumulation, and as to enactment.

(1) *Those requiring that the title should designate the character of the bill, and that only one object shall be embraced in a bill.*—Under such limitation, sections in a bill which are foreign to the subject embraced in the title may, in some jurisdictions, be rejected as not constitutionally passed. But a general designation, if fair, will be sufficient.[1] When the constitution, also, is in this respect merely directory, indicating a mode of action, this does not render void statutes not following its prescription;[2] though it is otherwise where the provision is peremptory and prohibitive.[3] Whether when clauses are introduced into a bill which are not designated by the title they vitiate the clauses properly designated, depends in part on the terms of the constitutional limitation, in part on the connection of the undesignated with the designated clauses. If they qualify essentially the designated clauses, then the whole bill falls. If they do not, but the bill is divisible, then the designated clauses may be sustained while the other clauses drop.[4]

Moore, *ex parte*, 62 Ala. 474; Burlington R. R. *v.* Saunders Co., 9 Neb. 507; Klein *v.* Kinkead, 16 Nev. 194.

[1] *Infra*, § 621.

[2] State *v.* Covington, 29 Oh. St. 102; Boston Mining Co., *in re*, 51 Cal. 624; Pim *v.* Nicholson, 6 Oh. St. 176.

[3] See cases cited *supra;* Cannon *v.* Hemphill, 7 Tex. 184; Marion Co. *v.* Winkley, 29 Kan. 36, and summary of cases in article by Judge Rose, in Am. Law Rev., July and Aug. 1883. As to what constitutes a title, see *supra*, § 621. That great accuracy in the title is not required, but that it is enough if the title calls attention, without misleading, to the general character of the statute, see *infra*, § 621. Nor does a clerical mistake, not calculated to mislead, avoid a bill. Walnut *v.* Wade, 103 U. S. 683. But that the old law is essentially modified in this respect in those states which require statutes to be logically descriptive, see Cooley, Const. Lim., 4th ed., pp. 97, 99, 172, 183.

[4] Unity *v.* Burrage, 103 U. S. 447; Nat. Bank of Chester *v.* Chester, 14 Fed. Rep. 239; Sweet *v.* R. R., 79 N. Y. 293; Middletown, *ex parte*, 82 N. Y. 202, Bernstein, *in re*, 3 Redf. (N. Y.) 20; Allegheny Home's App., 77 Penn. St. 77; Allegheny City *v.* Moorehead, 80 Penn. St. 118; Dewhurst *v.* Allegheny, 95 Penn. St. 437; People *v.* Father Mathew Soc., 41 Mich. 67; Allen *v.* Hall, 14 Bush, 85; Geiger *v.* McLin, 78 Ky. 232; Walker *v.* Griffith, 60 Ala. 361; State *v.* Chambers, 70 Mo. 625; State *v.* Mead, 71 Mo. 266; Eureka *v.* Davis, 21 Kan. 578; Peck *v.* San Antonio, 51 Tex. 490; Mabry, *ex parte*, 5 Tex. Ap. 93; Houston R. R. *v.* Odurn, 53 Tex. 343; Johnson *v.* State, 9 Tex. Ap. 249; Stone *v.* Brown, 54 Tex. 331; State *v.* Henderson, 32 La. An. 779. That cumulation of objects when prohibited by constitution is fatal, see cases cited above, and Wood-

(2) *Those prohibiting special laws on topics provided for by a general system of legislation.*—Laws contravening this limitation will be held to be inoperative.[1]

ruff *v.* Baldwin, 23 Kan. 491; State *v.* Ah Sam, 15 Nev. 27.

Montclair *v.* Ramsdell, 107 U. S. 147, arose under a clause in the constitution of New Jersey providing that "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." It was held by the supreme court that this provision does not require that the title of an act shall embody a detailed statement, nor be an index or abstract, of its contents; nor does it prevent the uniting in the same act of any number of provisions having one general object fairly indicated by its title; and that the powers, however varied and extended, which a new township may exercise constitute but one object, which is fairly expressed by a title showing nothing more than the legislative purpose to establish such township. "The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it is not sufficiently expressed by the title. See State *v.* Town of Union, 33 N. J. L. 350; State *v.* City of Newark, 34 id. 236; Gifford *v.* New Jersey R. Co., 2 Stockt. 172; Rader *v.* Township of Union, 39 N. J. L. 509; Pennsylvania R. Co. *v.* National R. Co., 23 N. J. Eq. 441; Cooley, Const. Lim., 146, n. 1. The holder of a negotiable security is presumed to have acquired it in good faith and for value. But if in a suit upon it, the defence be such as to require plaintiff to show that value was paid, it is not, in every case, essential to prove that he paid value, for if any intermediate holder between him and the defendant gave value, such intervening consideration will sustain his title. Goodman *v.* Simonds, 20 How. 343; Murray *v.* Lardner, 2 Wall. 110; Shaw *v.* Railroad Co., 101 U. S. 557; Swift *v.* Smith, 102 id. 442; Hunter *v.* Wilson, 19 L. J. (N. S.) Ex. 8; Commissioners *v.* Bolles, 94 U. S. 104; Railroad Co. *v.* National Bank, 102 id. 14." For a discussion of similar points in the constitution of Pennsylvania, see Buckalew on the Constitution of Pennsylvania, 67, and cases there cited; and see Harris *v.* People, 59 N. Y. 599; Phil. Pass. R. R. *v.* Union R. R., 9 Phila. 495; Esling's App., 89 Penn. St. 205; Craig *v.* Church, 88 Penn. St. 42; Strauss *v.* Heiss, 48 Md. 292; Williams *v.* State, 48 Ind. 306; Hind *v.* Rice, 10 Bush, 528; Allen *v.* Tison, 50 Ga. 374; Walker *v.* State, 49 Ala. 329; State *v.* Shadle, 41 Tex. 404; Morton *v.* Comptroller, 4 S. C. 430.

Mr. Buckalew, in his work on the Constitution of Pennsylvania, p. 68, thus speaks: "In a given case it may be difficult to say what is the subject-matter of a bill, to be clearly expressed in the title; under this provision of the constitution, avoiding prolixity of statement, and consulting clearness of expression, the question will still remain as to the degree of fulness and particularity required. As cases shall

[1] Dorchester *v.* Meekins, 50 Md. 28.

(3) *Those requiring specific majorities to pass appropriation or other particular classes of acts.*—When a "majority of two-thirds" is required, this, as we have already seen in respect to the majority necessary to pass a bill over a veto,[1] means two-thirds of the quorum voting. When a specific number of all the members of a house is required, then this number must be shown to have voted for the bill in order to insure its passage.[2]

(4) *Those requiring that the fact of three readings and the ayes and noes be entered on the journal.*—A failure in this respect is fatal to the bill.[3] But the burden of showing the infraction of the constitution must in such case be upon the party setting it up.[4] Whether the courts can examine the legislative journals, for the purpose of determining how far the conditions imposed by the constitution have been complied with,

arise and undergo discussion in courts of justice, rules to aid us upon this question, with illustrations of their application, will be gradually supplied. But the reluctance with which courts, even of the highest grade, yield to an argument against the validity of a statute upon constitutional grounds, will admonish us that judicial decisions are not alone to be consulted in the construction of this section. The annulment of a statute by judicial authority is commonly productive of inconvenience, and where the objection made against the statute is only to its form, a judge will be inclined, and properly so, to sustain the statute. It is to the legislature itself, primarily and mainly, to see to it that the bills passed by it are in all respects, both as to form and substance, conformed to the constitution. Titles open to objection on constitutional grounds may be classed as follows: 1. Those which are vague, uncertain, indeterminate in expression and meaning; 2. Those which are too general—of too wide a sweep—not specific; 3. Those which indicate only a part of the bill; 4. Those which express or suggest a falsehood, or otherwise mislead by the terms used; and 5. Those which, for any other reason, do not fairly and fully express the subject-matter of the bill. Redundant language in titles is to be deprecated as a source of inconvenience in the examination of bills and laws, but will not be fatal, unless it produces obscurity or leads to mistake."

[1] *Supra*, §§ 398, 512.

[2] Walker *v.* State, 12 S. C. 200.

[3] Santa Clara *v.* R. R., 18 Fed. Rep. 385; Ryan *v.* Lynch, 68 Ill. 160; State *v.* Francis, 26 Kans. 724; Smithee *v.* Garth, 33 Ark. 17; State *v.* Crawford, 35 Ark. 237. In Missouri a later view is taken, the statute being held to be merely mandatory; State *v.* Mead, 71 Mo. 266; see Seven Hickory *v.* Ellery, 103 U. S. 423; State *v.* Lake City, 25 Minn. 204; Brown *v.* Nash, 1 Wy. Ter. 85; Perry Co. *v.* Selma R. R., 58 Ala. 546.

[4] Mabry, *ex parte*, 5 Tex. Ap. 93; see Walnut *v.* Wade, 103 U. S. 683. As to limitation of time in which new bills are to be introduced, see Pack *v.* Barton, 47 Mich. 520.

is a question as to which there has been great difference of opinion. The weight of authority now is that the journals may be received to prove matters of which they are primary evidence, *i. e.*, the course which the bill took in proceeding through the legislature.[1]

[1] See Whart. on Ev., §§ 289, 295. In Amoskeag Nat. Bank *v.* Ottawa, 106 U. S., 667, Gray, J., in the opinion of the court, said:—

"The facts of the cases do not substantially differ from those which appeared when one of the cases was before this court at October term, 1876, and the principles then affirmed must control the present decision; see South Ottawa *v.* Perkins, and Supervisors of Kendall *v.* Post, 94 U. S. 260. Those principles may be summed up as follows: First. By the law of the State of Illinois, as often declared by the supreme court of that state, before as well as after the execution of the bonds in suit, the provisions of the constitution of 1848 requiring each house of the legislature to keep and publish a journal of its proceedings, and, on the final passage of all bills, to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members elect at each house, are not merely directory; but if the journals, being produced or proved, failed to show that an act has been passed in the mode prescribed by the constitution, the presumption of its validity, arising from the signatures of the presiding officers and of the executive is overthrown, and the act is void. Second. Whether a seeming act of the legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury. Third. The construction uniformly given to the constitution of a state by its highest court is binding on the courts of the United States as a rule of decision. Fourth. An act of the legislature of a state, which has been held by its highest court not to be a statute of the state, because never passed as its constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the state. Fifth. That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value and in the belief that they have been lawfully issued. It was accordingly held that the act of the general assembly of Illinois of February 18, 1857, under which the bonds in suit were issued, having been adjudged by the supreme court of that state in 1870, in the cases of Ryan *v.* Lynch, 68 Ill. 360, and Miller *v.* Goodwin, 70 ib. 659, upon proof that the journals did not show it to have been enacted in conformity with the requirements of the constitution, to have become a law, and to have conferred no power, although referred to in later statutes as an existing law, those decisions must govern the action of the courts of the United States. The weight of those decisions as authoritative expositions of the constitution of the state is not affected by the fact that these plaintiffs were not parties to the suits in which they were delivered. Elmwood *v.* Marcy, 92 U. S. 289; East Oakland *v.* Skinner, 94 ib. 255. Nor is it of any importance that the act of 1857 had been assumed to be an existing law in Dunnovan *v.* Green, 57 Ill. 63, and in Force *v.* Batavia, 61 ib. 99;

(5) *Those limiting indebtedness.*—When a state constitution limits the amount to which a state may incur indebtedness,

for in each of those cases the validity of the statute was not controverted, and by the established practice of that court no evidence of the contents of the journals could be considered on appeal, which had not been produced and made part of the case in the court below. Illinois Central Railroad *v.* Wren, 43 Ill. 77; Bedard *v.* Hall, 44 ib. 91; Grob *v.* Cushman, 45 ib. 119; see, also, People *v.* Dewolf, 62 Ill. 253, 256; Bins *v.* Weber, 81 ib. 288, 291."

In Chicot County *v.* Davis, Sup. Ct. of Arkansas, 1883 (18 Cent. L. J. 10; 17 Rep. 141), we have the following elaborate exposition of the law from Smith, J.:—

"The sole question which we are called upon to decide is, whether the act of July 23, 1868, authorizing counties to subscribe stock in railroads was duly and constitutionally passed.

"The history of this law, as disclosed by the legislative journals, is as follows: The bill was introduced in the house of representatives on July 17, 1868, and on July 20 it was read a first time. The rules were then suspended and the bill was read a second time. Several amendments were adopted, all of which were for the mere purpose of filling blanks except one. On July 21 the bill was by unanimous consent read the third time by title and passed by a vote of 45 to 1; the yeas and nays being entered on the journal. On the same day the bill was transmitted to the senate, where it received a first reading. Then, under a suspension of the rules, it was read the second and third time and passed by a unanimous vote; the names of those voting in the affirmative and of absentees being noted on the journal.

"The bill was afterwards presented to and approved by the governor, was duly enrolled and deposited among the archives of the state, was published as a law, and has been recognized and acted upon by all departments of the government ever since. Under its authority, it is said, more than $1,000,000 of bonds have been issued by various counties.

"I. It is objected that the bill was not read three times in the house, as required by section 21, article v., constitution of 1868, because the journal shows the third reading was by title only.

"The several stages through which a bill passed in parliament before it became a law were established by usage. 'Before the invention of printing, and when the art of reading was unknown to three-fourths of the deputies of the nation, to supply this deficiency, it was directed that every bill should be read three times in the house. At the present day, those three readings are purely nominal; the clerk confines himself to reading the title and the first words.' Bentham Pol. Tac. Works, ii. 353.

"The constitution provided that every bill should be read three times on different days in each house before the final passage thereof, unless two-thirds of the house where the same is pending should dispense with the rules.

"In Smithee *v.* Garth, 33 Ark. 17, the third reading of the bill in the house and the first reading in the senate were by title only; and although the act was held invalid, it was not for this cause; but it was intimated that in such cases the journal show a suspension of the rules. The infer-

any contracts entered into by the state in excess of such limit are void.[1]

ence is clear that, in the opinion of the court, it was competent for the house, in which a bill was pending, by a vote of the requisite majority, not only to order a second or third reading on the same day, but also to dispense with the reading of the bill by sections.

"In English *v.* Oliver, 28 Ark. 317, a law was assailed because the bill had not been read three times on different days in the house of representatives, nor had the rules been suspended. The journal failed to show that it had been read a first and second time, but did show a third reading by title. The court sustained the validity of the act upon the ground that a third reading necessarily implies two previous readings. If the proposition now contended for were true, the bill had never been read at all in the house.

"In Worthen *v.* Badgett (32 Ark.

---

[1] Williams *v.* Louisiana, 103 U. S. 637; Durkee *v.* Board of Liquidation, 103 U. S. 646; see Railroad Co. *v.* Gaines, 97 U. S. 697, cited *supra*, § 482; and see *supra*, § 526.

"Has a bill received a constitutional majority? Has it passed over the governor's veto? Did it pass in a constitutional shape? Does it, for instance, as is required by the constitutions of several states, relate to but one subject, which is expressed in the title? Questions of this kind are vital when a court has to determine whether a statute exists; but questions of this kind cannot be solved without resort to records of the legislature. It is for the court, with such aid, to determine whether the statute in dispute has passed. For this purpose the original record is the best evidence, unless the printed journals be made so by statute; and of the original record, or of the printed journals, when such are made evidence by statute, the court is bound to take judicial notice." (Whart. on Ev., § 290.)

In Buckalew on the Constitution of Pennsylvania, pp. 68–9, we have the following: "The objects had in view in the adoption of this section (that providing that bills should relate to one subject, to be expressed in the title), and in the adoption of the amendment of 1864, which it reënacts, were to prevent 'log-rolling' and fraud, trickery, or surprise in legislation. Every measure is to stand upon its own merits without borrowing strength from one another, and the members of each house, and still more the public, are to have notice by its very title of the contents or nature of a bill. The construction of the section, therefore, must be such as will promote the attainment of these objects, and the words must not be weakened by nice refinements or distinctions, or wrested from their plain and natural import. But, on the other hand, we are not to suppose that the section was intended to embarrass the passage of fair and necessary laws, or to encumber the titles or bills with unnecessary or prolix recitals or suggestions of their contents. A title to a bill is not designed to furnish an index, abstract, or summary of the bill, but only to characterize it, and state the subject to which it relates. But one subject can be included in a bill, and the title must clearly inform us what that subject is. Beyond this the section does not go."

Construction to be distin-

§ 604. Construction and interpretration, it must be remembered, are distinct functions. Interpreta-

496) the last two readings in the senate of the bill for the act of April 29, 1883, were by the title, and yet the act was sustained.

"So that it is no longer an open question that, under the constitution of 1868, bills might be read by title under a suspension of the rules. The rule is probably different under the constitution of 1874, which requires bills to be read at length. Art. v. § 22.

"II. But it is further contended that, supposing the bill might have been read by the title under a suspension of the rules, yet the rules were never actually suspended.

"As the greater contains the less, unanimous consent is probably equivalent to a suspension of the rules, or implies it. But if this be not so, the constitution under which this legislature was held, did not require the journal affirmatively to show a suspension of the rules. And for the purpose of upholding a law which appears upon the statute book, we will presume this was done. Vinsant *v.* Knox, 27 Ark. 278; English *v.* Oliver, 28 id. 320; Worthen *v.* Badgett, 32 id. 513.

"III. A third objection was, that the bill was read for the first time in the senate on the same day that it passed the house, without a suspension of the rules.

"The constitution does not mean that a bill cannot be read in both houses on the same day unless the rules are suspended. The design of all such restrictions is to prevent hasty and improvident legislation, by giving members time to inform themselves about measures pending before them. Nothing could be gained by having a day to intervene between the passage of an act in one house, and its first reading in the other. It would have passed from the consideration of the house in which it originated, and it would not be before the other house at all until it had been once read.

"Such a construction presupposes a knowledge, by the members of either house of the proceedings in the other, which, in the nature of things, it is not to be expected that they should possess. In the matter of the several readings, each house acts independently of, and without reference to the other. But the point has, perhaps, already been settled by State *v.* Crawford (35 Ark. 237), when the bill, it seems, was pending in both houses on the same day.

"IV. The fourth proposition is, that the bill, approved by the governor, and enrolled in the office of the secretary of state, differs from the bill which passed the general assembly. The alleged variance consists in this: the original draft of the bill, and the bill as it was enrolled and approved by the governor, provided that the county court should submit the question of subscription to a popular vote, upon the joint application of the president and directors of the railroad company, and one hundred voters of the county. It is claimed that an amendment in the house, substituting 'or' for 'and' authorized the election to be ordered upon the petition either of the railroad company or of one hundred voters. This variance can be detected only by a comparison of the original draft, and the journal of the house with the enrolled act.

"It is contended, in support of the act, that the enrolment is conclusive, and that the courts cannot go behind

tion is the determination of the meaning of a disputed word; construction assumes that the words

Distinguished from interpretation.

it to the journals, or the original draft, for the purpose of examining into the contents of a bill or the passage of a law.

"This is certainly the rule in England. The oldest case on the subject, which we have been able to find, is King *v.* Arundel, Hobart's Rep. 109, decided in 1616. There it was sought to get rid of a private act of parliament, which had the king's assent and the great seal, because it was not the act of the lords and commons. At the trial in the court of chancery, it was proposed to show by the journal of the lords, that a *proviso* had been passed as a part of the bill. The question thus arose on the admissibility of the journals to impeach the act. The court examined the journals, and would not find that the act had been passed by both houses, and said: 'But, now, supposing that the journals were every way full and perfect, yet it had no power to satisfy, destroy, or even weaken the act, which being a high record, must be tried only by itself *teste me ipso*. Now, journals are no records, but remembrances for forms of proceedings to the record; they are not of necessity, neither have they always been. They are like dockets of the pronotaries, or the particular to king's patients.' And so it was held that the courts could not go behind the authentication of the act.

"This case, it is believed, has never been departed from in England, and it has been followed by the courts of last resort in many of the United States. Eld *v.* Gorham, 20 Conn. 8; Green *v.* Weller, 32 Miss. 650; Swann *v.* Buck, 40 Miss. 268; Pacific R. R. Co. *v.* Governor, 23 Mo. 353; Duncombe *v.* Prindle, 12 Iowa, 1; State *v.* Young, 32 N. J. Law, 29; Plank Road Co. *v.* Spear, 22 Penn. St. 376; Evans *v.* Browne, 30 Ind. 514; Sherman *v.* Story, 30 Cal. 253; People *v.* Burt, 43 Cal. 560; Brodrax *v.* Groom, 64 N. C. 244; People *v.* Devlin, 33 N. Y. 269; People *v.* Commissioners of Marlborough, 54 N. Y. 276; Fouke *v.* Fleming, 13 Md. 392; Mayor *v.* Harwood, 32 Md. 471; State *v.* Swift, 10 Nev. 176; Louisiana State Lottery *v.* Richoux, 23 La. Ann. 743. But in some of these states there have been oscillations of opinion on this vexed question, the effect at least in part of change of organic law. Brady *v.* West, 50 Miss. 68; Bradley *v.* West, 60 Mo. 33; State *v.* Mead, 71 Mo. 266; People *v.* Purdy, 2 Hill, 31, and 4 Hill, 384; De Bow *v.* People, 1 Denio, 9; Commercial Bank *v.* Sparrow, 2 Den. 97; Thomas *v.* Dakin, 22 Wend. 9; Hunt *v.* Van Alstyne, 25 Wend. 605; People *v.* Supervisors of Chenango, 8 N. Y. 317; Berry *v.* Baltimore R. R. Co., 41 Md. 446; Legg *v.* Annapolis, 42 Md. 203; Southwark Bank *v.* Com., 26 Pa. St. 446.

"The people of England have no written constitution defining and limiting the powers of their government. The parliament being supreme, there can be no such thing as the passage of laws in an unconstitutional manner. And the English rule is the safer in the absence of constitutional restraints upon the legislature in the mode of enacting laws. But to apply it in states whose constitutions contain minute directions about the formalities to be observed in the passage of laws, is to nullify provisions which were intended as safeguards against reckless and vicious legislation, however illusory such protection may prove to be. Thus the constitution of 1868 ordains 'Each

have all an ascertained meaning, and settles their relations to each other. Interpretation is for the jury; construction

house shall keep a journal of its proceedings and publish the same,' etc. 'No bill . . . shall become a law without the concurrence of a majority of all the members voting. On the final passage of all bills, the vote shall be taken by yeas and nays, and entered on the journal.' 'No act shall embrace more than one subject, which shall be embraced in its title.' 'No new bill shall be introduced into either house during the last three days of its session, without the unanimous consent of the house in which it originated.' Art. v. secs. 16, 21, 22, 24.

"Now, since the fundamental law declared that certain formal rules should be complied with before it becomes a law, and the appropriate office of the journal is to record the successive steps of legislative action, the inference is irresistible that this journal is evidence. Accordingly, in a majority of the statutes, where these new fundamental requirements have been introduced, the possibility of overturning the statute roll by the journal exists. Spangler *v.* Jacoby, 14 Ill. 297; Prescott *v.* Canal Co., 19 id. 324; People *v.* Starne, 35 id. 121; Ryan *v.* Lynch, 68 id. 160; Miller *v.* Goodwin, 70 id. 659; South Ottawa *v.* Perkins, 94 U. S. 260; Trustees *v.* McCaughey, 2 Ohio St. 152; Fordyce *v.* Godman, 20 id. 1; James *v.* Hutchison, 43 Ala. 721; Moody *v.* State, 48 Ala. 115; Osburn *v.* Staley, 5 W. Va. 85; Opinion of the Justices, 35 N. H. 579, and 52 N. H. 622; State *v.* Platt, 2 S. C. 150; Green *v.* Graves, 1 Doug. (Mich.) 351; Hurlbut *v.* Britain, 2 Doug. 191; People *v.* Mahoney, 13 Mich. 481; Supervisors *v.* Heenan, 2 Minn. 330; Commissioners *v.* Higginbotham, 17 Kan. 62; Hull *v.* Miller, 4 Neb. 503; Cottrell *v.* State, 9 Neb. 125. This last has always been the rule in this state. Burr *v.* Ross, 19 Ark. 250; English *v.* Oliver, 28 id. 321; Knox *v.* Vinsant, 27 id. 278; State *v.* L. R. M. & T. R. Co., 31 id. 716; Worthen *v.* Badgett, 32 id. 516; Smithee *v.* Garth, 33 id. 17; State *v.* Crawford, 35 id. 237.

"But, at all events, it is urged that we cannot go behind the journals for the purpose of examining the draft of the bill. In Loftin *v.* Watson, 32 Ark. 414, and in Haney *v.* State, 34 Ark. 263, this court did examine the original bills introduced into the legislature. The true rule upon this subject was enunciated in Gardner *v.* Collector, 6 Wall 499: 'We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges, who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such questions, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.' In that case, only the date of the president's approval of the act of congress was in question. In Scott *v.* Clark Co., 34 Ark. 283, this rule was followed by this court.

"The enrolment is a solemn record, and the existence of the act is to be tried by the record, and is not to depend on the uncertainty of parol proof, or upon anything extrinsic to the law and the authenticated recorded proceedings in passing it. But the enrolled act is not the only record in the

is for the court. Intepretation is a question of fact, as to which the jury may be aided by experts in the meaning

case. The inquiry may be carried back to the legislative journals and the records and files of the secretary of state. In the matter of Wellman, 20 Vt. 656, the original draft of the bill comes before us certified by its proper custodian. Sec. 2731 of Gantt's Dig. provides: 'The secretary of state shall receive from the secretary of the senate and clerk of the house of representatives, the records, books, papers, and rolls of the general assembly, and file the same as records of his office.'

"Sec. 2450: 'Copies of any act, resolution, or order of the general assembly, commissions, or other official acts of the governor, and of all rolls, records, documents, papers, bonds and recognizances deposited in the office of the secretary of state, and required by law there to be kept, certified under his hand and seal of office, shall be received in evidence in the same manner and with like effect, as to the original.'

"Section 2 of the original draft of the bill reads thus: 'Whenever the president and directors of any such railroad shall make application to the county court of any county for a subscription by such county to its stock, specifying the amount to be subscribed, and the conditions of such subscription, and ——— of the voters of the county shall petition the court for such purpose, etc.' The only word on the tenth line was the word 'and;' the remainder of the line being blank, which was afterwards filled by an amendment inserting the words 'one hundred,' before the words 'of the voters.' It also appears from the manuscipt journal that the house adopted this amendment: 'Sec. 2, line 10, add the word "or," instead of "and." The published journal, at the same place in the proceedings, read: 'Annex the word "or."' This last reading is totally insensible, as it does not show that 'and' was stricken out, and there is nothing on line 10 to which 'or' can with any propriety be annexed. However, the manuscript minutes are a higher grade of evidence than the printed copy, and must control. They show with reasonable certainty that the house amended the bill, by striking out 'and' and inserting 'or.' Does it follow that the bill which passed the general assembly was not the same bill which was presented to and signed by the governor?

"In Cooley's Constitutional Limitations, 135, it is said: 'Each house keeps a journal of its proceedings, which is a public record of which the courts are at liberty to take judicial notice. If it should appear that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence and adjudge the statute void. But whenever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of a legislative body; it will not be presumed in any case, from the mere silence of the journals, that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action taken, as, for instance, where it requires the yeas and nays

of words, by general knowledge, and by proof, when the statute deals with local custom, of the meaning of such custom.

to be entered.' This presumption in favor of the one passage of laws was acted upon in regard to the three readings of a bill in Vinsant *v.* Knox, 27 Ark. 278, which has been followed in several other cases, as we have seen. Now, the constitution of 1868 did not require amendments to bills to be entered on the journals. Consequently, in order to uphold the act, we will presume that the house receded from its amendment, substituting 'or' for 'and.'

"Equally liberal presumptions have been indulged by other courts. Blessing *v.* Galveston, 42 Texas, 641; Miller *v.* State, 3 Ohio St. 475; McCullough *v.* State, 11 Ind. 424; Supervisors *v.* People, 25 Ill. 181; Commissioners *v.* Higginbotham, 17 Kas. 62. While the journals furnish evidence of the legislative proceedings, so far as they go, yet courts are not bound to hold that nothing was done, except what appears therein. Their silence is conclusive only in those matters where the constitution requires them affirmatively to show the action taken. It is notorious that these journals are loosely kept, and their entries often unintelligible; that they are constructed out of hasty memoranda, made in the pressure of business and amid the distraction of a numerous assembly; that the reading of them each morning is frequently dispensed with, and there is not a single guaranty of their accuracy or their truth, which is not in practice usually ignored. Nobody vouches for them, and upon final passage of a bill, they are not searched to know whether they contain enough to insure the law's validity. On their value as evidence, see 13 Cent. L. J. 181. The enrolled statute, on the contrary, has many guarantees for its correctness. It is enrolled under the supervision of committees of both houses, composed of members who are conversant with the proceedings of their respective bodies, and whose duty it is to compare it with the engrossed bill, the original draft, and the journals. We believe, also, that it has been the invariable practice in this state for the president of the senate and the speaker of the house to sign the same. It is then laid before the governor, and if he approves it, it is deposited with the secretary of state, and becomes a high and sacred record.

"To make all legislation ultimately depend on the fidelity with which a journal clerk has made his entries, is, in the language of Judge Black, in Thompson's Case, 9 Opinions of Attorneys-General, 1, to render the laws as uncertain as the terms of a horse trade. We fear to turn loose a principle which might devour the whole statute book.

"The judgment of the Chicot circuit court, quashing the levy of the county court to pay interest on the bonds issued under this act, is reversed, and the cause remanded with directions to dismiss the petition for the writ of *certiorari*."

In State *v.* Glenn, Sup. Ct. Nev., 1883 (West Coast Rep., vol. i., No. 1), it was held that evidence that an enrolled act has been certified by those officers who are charged by the constitution with the duty of deciding what laws have been enacted, that it has been signed by the proper officers of each house, approved by the governor, and filed in the office of the secretary of state, is conclusive as to the passage of such act as enrolled, and the only evidence thereof. It was further held

Construction is a question of law, to be determined by authoritative precedent, if there be any in point, and if there be not, by analogy, appealing to the document as a whole.[1] Yet in one marked line of cases interpretation may be a matter of law. The legislature may attach to a statute a schedule giving the meaning of certain of its words. If so, this meaning is to be accepted absolutely, so far as it goes. It may also happen that the legislature may use a word as a short-hand expression for a common law term, which needs legal exposition to make it understood; and, if so, such exposition must be given. Thus, in the Federal statute relative to offences on the high seas, "piracy," is subjected to a specific penalty. There is no definition given of piracy, and as the word is evidently used as having a settled legal meaning, we must resort to the common law, or to the law of nations as part of the common law, to determine what that meaning is.[2]

In this country, construction modified by the existence of constitutional limitations.

§ 605. The latitude allowed in the construction of statutes is in this country restrained by constitutional limitations which render inoperative statutes which in England the courts are tempted to render inoperative by construction. In England, parliament is so far omnipotent that it may constitutionally pass statutes impairing the obligation of contracts, or establishing or abolishing religious tests, or denying jury trials in part, or *in toto*, or confiscating private property, or imposing *ex post facto* punishment, or convicting and directing the execution of alleged criminals. Statutes to effect any one of these objects would in this country be mere blank paper. All that the courts would have to say would be that they are unconstitutional, and this would be an end to them. In England there is no such check,[3] as by the British constitution,

that the provisions of the constitution regulating the passage of bills, and providing for their authentication, should be construed with reference to existing customs in legislative and parliamentary bodies. Signing an act of the legislature by the assistant secretary of the senate, it was held, is a substantial compliance with the provision of the constitution requiring all acts and joint resolutions to be signed by the secretary of the senate.

[1] See Whart. on Cont., § 641 *et seq.*

[2] *Supra*, §§ 181, 200, 452.

[3] See *supra*, §§ 393–4; 519.

no statute of the imperial parliament can be unconstitutional. The consequence is that, to prevent acts outrageously wrong from operating, English judges have been led to adopt a latitude of construction to which it may not be necessary in this country to have resort, except in those cases to which no constitutional limitation applies.[1]

Presumption in favor of constitutionality.[2]

§ 606. Not only is the burden of proof on the party setting up the unconstitutionality of a statute, but the courts will not hold a statute to be unconstitutional unless on a clear case.[2] Nor will such unconstitutionality be usually ruled if the case can be properly decided

[1] In the sense of the text, are we to understand the following from Chase, J., in Priestman *v.* U. S., 4 Dal. 30, n. "By the rules which are laid down in England for the construction of statutes, and the latitude which has been indulged in their application, the British judges have assumed a legislative power; and on the pretence of judical exposition have, in fact, made a great portion of the statute law of the kingdom. Of those rules of construction, none can be more dangerous than that, which, distinguishing between the intent and the words of the legislature, declares that a case not within the meaning of a statute according to the opinion of the judges, shall not be embraced within the operation of statute, although it is clearly within the words; or, *vice versa*, that a case within the meaning, though not within the words, shall be embraced. We should invariably deem it our duty to defer to the expression of the legislature, to the letter of the statute, when free from ambiguity, a doubt, without indulging in speculations, either upon the impropriety or hardship of laws." It must be remembered, however, that Judge Chase was distinguished as much for limiting the rightful power of the courts as developers of law as he was for exaggerating their personal prerogatives (see Whart. St. Tr., 42, 718, n.). And so far as his position is inconsistent with the rules heretofore expressed (*supra*, §§ 30 *et seq.*), it is no longer authoritative.

[2] *Supra*, § 385; Fletcher *v.* Peck, 6 Cranch, 87; Ogden *v.* Saunders, 12 Wheat. 213; Gates *v.* Brooks, 59 Iowa, 510; Lynch, *ex parte*, 16 S. C. 32; Walker *v.* Griffith, 60 Ala. 361; Smithee *v.* Garth, 33 Ark. 17; People *v.* Loewenthal, 93 Ill. 191.

Chief Justice Marshall, in the Dartmouth College Case (4 Wheat. 625), speaking for the whole court, said: "This court can be insensible neither to the magnitude nor delicacy of the question. The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of the state is to be revised, etc. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has decided that in no doubtful case would it pronounce a legislative act to be unconstitutional."

To same effect, see New York R. R. *v.* Vanhern, 57 N. Y. 473; Aultman's App., 98 Penn. St. 505; Legg *v.* Annapolis, 42 Md. 203; Slack *v.* Jacob, 8 W. Va. 612.

on another issue.[1] But want of jurisdiction is a radical defect which, when alleged, the court is obliged to notice.[2]

[1] Randolph, *ex parte*, 2 Brock. 447.

[2] Ibid.

"Another general presumption is that the legislature does not intend to exceed its jurisdiction. Primarily the legislation of a country is territorial. The general maxim is, that extraterritorium jus dicenti impune non paretur, or, that leges extraterritorium non obligant. Dig. 2, 1, 20. It is true this does not comprise the whole of the legitimate jurisdiction of a state; for it has a right to impose its legislation on its subjects in every part of the world; but in the absence of an intention clearly expressed, or necessarily to be inferred from the language, or from the object or subject-matter of the enactment, the presumption would be that parliament did not design its statutes to operate on them beyond the territorial limits of the United Kingdom (Rose *v.* Hinely, 4 Cranch, 241, per Marshall, C. J; The Zollverein, Swab. 96, per Dr. Lushington; Cope *v.* Doherty, 4 K. & J. 367; 2 De G. & J. 614; 27 L. J. MC. 660), and they are to be read as if words to that effect had been inserted in them. Per Pollock, C. B., in Rosseter *v.* Calhmann, 8 Ex. 361; and per Cur. in The Amalia, 1 Moo. P. C. N. S., 471.

"Thus, a woman who married in England, and afterwards married abroad during her husband's life, was not indictable under the statute of James I. against bigamy; for the offence was committed out of the kingdom, and the act did not in express terms extend its prohibition to subjects abroad. 1 Hale, S. C., 662." Maxwell on Statutes, 114.

In Fletcher *v.* Peck (6 Cranch, 128) it was said by Marshall, C. J.: "The question whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom or never to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication, and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. If such be the rule by which the examination of this case is to be governed and tried (and that it is, no one can doubt), I am certainly not prepared to say that it is not, at least, a doubtful case, or that I feel a clear conviction that the case in question is incompatible with the constitution of the United States."

In Green *v.* Biddle, Mr. Clay, in his argument, said: "The court will exercise its power with the most deliberate caution. This court is invested with the most important trust that was ever possessed by any tribunal for the benefit of mankind. The political problem is to be solved in America, whether written constitutions of government can exist. They certainly cannot exist without a depositary somewhere of the power to pronounce upon the conformity of the acts of the delegated authority to the fundamental law. This court is that depositary, and I know not of any better. But success of this experiment, so interesting to all that is dear to the interests of human na-

§ 607. The question of the unconstitutionality of a statute is divisible when a part of a statute is unconstitutional. This, unless it is necessary to construe the statute as a whole, does not affect such portions of the statute as are constitutional.[1]

Statutes may be unconstitutional in part.

§ 608. We are also told by high English authority that acts of parliament will not be construed in such a way as to conflict with natural justice. It is no doubt true that with us, as in England, when the arguments for two conflicting constructions of a statute are in equilibrium, that which is most just will be preferred.[2] But when a statute is within the constitutional power of the legislature, the justice of its policy is not with us a question for the courts. No matter how impolitic or illiberal a statute may be, the courts, as a general rule, will feel bound to enforce it, unless it contravenes some specific limitation of the constitution. The very fact that such limitations are specifically enumerated confines the courts to the objections which they designate and describe.[3] Nor, when the statute is plain, can inconveniences be taken into consideration.[4] Nor can property be arbitrarily transferred from

Injustice and impolicy no grounds to avoid statute.

ture, depends upon the prudence with which this high trust is executed." 8 Wheat., 48.

[1] See, for authorities, *supra*, § 385.

[2] *Infra*, § 609 *et seq.*

[3] The *dictum* of Coke, in Bonham's Case (8 Rep. 114 *a*), "that the common law doth control acts of parliament, and adjudges them void, when against common right and reason," and which was approved as "reasonable and true" by Lord Holt in London *v.* Wood, 12 Mod. 687, while frequently spoken of with respect, has never been practically acted on. In this country, however, the supreme court of South Carolina, in Bowman *v.* Middleton, 1 Bay, 252, decided in 1792, declared an act of the colonial legislature to be void as against common right. The same test was applied in New York, in 1880, to an act of the Canadian Parliament. Gebhard *v.* R. R., 17 Blatch. 416. See remarks of Story, J., in Wilkinson *v.* Leland, 2 Pet. 657, and cases cited *supra*, 107 *c*.

That the morality of an act is not to be taken into consideration in determining its validity, though all intendments will be made against an immoral construction, see Cooley, Const. Lim. 168; Bennett *v.* Boggs, Bald. 60; Sill *v.* Corning, 15 N. Y. 297; People *v.* Rochester, 50 N. Y. 525; People *v.* Briggs, 50 N. Y. 553; Newland *v.* Marsh, 19 Ill. 376; Dorman *v.* State, 34 Ala. 216; Jewell *v.* Weed, 18 Minn. 272.

[4] Putnam *v.* Longley, 11 Pick. 487; Leonard *v.* Wiseman, 31 Md. 201; License Tax Cases, 5 Wall. 462; State *v.* Liedtke, 9 Neb. 468.

one man to another even though this does not infringe a constitutional prohibition.[1]

§ 609. It is sometimes said that statutes in derogation of the common law will be construed strictly. This position, however, cannot be maintained. What is called the common law sometimes becomes unsuited to the changed conditions of the times. We have

Rights not to be taken away except by express enactment.

[1] Powers *v.* Bargen, 2 Seld. 358; People *v.* Edmonds, 15 Barb. 529; see other cases in Sedg. Stat. Law, 129–130.

"Absolute power," says Mr. Dwarris, page 483, "must be placed somewhere, and to it implicit obedience must be paid. It can nowhere be so safely placed as in the hands of those who frame the laws, though the laws they establish may sometimes be pernicious, opposed to morality, and, as we can collect it, to the divine will as measured by the laws of God, which must be the ultimate test, however laws may be unjust, but they will still be obligatory." He suggests only two limitations: "First, that all laws which attempt to bind future parliaments are, *ipso facto*, void; Dwarris, p. 479; Jenk. Cent., 27; and, secondly, that if any provision of a statute conflicts with the law of God and nature, the law itself will be respected, but vicious parts will be deemed excepted out of the statute." He says: "The English lawyers adopt a more cautious and a very characteristic mode of proceeding. They do not inculcate implicit obedience to a law which leads to absurd consequences, or to an infraction of the natural or divine law; neither do they proclaim the law itself (which may be immoral, but cannot be illegal) of no validity, and null and void. They only hold it inapplicable, and declare that the particular case is excepted out of the statute;" part ii. pages 484 and 623. "For this position," says Mr. Sedgwick (Stat. Law, p. 127), "Mr. Dwarris cites no more recent authority than a dictum of Lord Coke; 2 Inst., 25; 2 Inst., 84; Dwarris, 624; nor can I reconcile it with his previous reasoning. The distinction is, I believe, one of a metaphysical and not of a practical character; and I apprehend that no modern case can be found, where the English judiciary have attempted to question the supremacy of parliament. Mr. Dwarris himself says (p. 484): 'The general and received doctrine certainly is, that an act of parliament, of which the terms are explicit and the meaning plain, cannot be questioned, or its authority controlled in any court of justice.' In the recent discussion which took place in the English courts on the subject of the privilege of the house of commons, the house printer having been sued for an alleged libel, and pleading in defence the orders and privileges of the house, though the court of king's bench denied the validity of the plea, the absolute power of parliament was admitted. 'Parliament,' said Lord Denman, 'is said to be supreme. I most fully acknowledge its supremacy;' Stockdale *v.* Hansard, 11 Ad. & E. 253; also see Mr. Justice Coleridge's opinion in the same case. It is on this principle too that it is understood that the private acts of parliament are upheld as a common mode of assurance. 2 Bl. Com., 344; 2 Kent. Com., 448; Powers *v.* Bergen, 2 Seld. 358."

an illustration of this in the old rule limiting territorial waters to a marine league, which was at one time supposed to be the range of cannon-shot.[1] When, however, the range of cannon-shot became far greater than a marine league, there were two ways of securing such police of marginal seas as would prevent undue molestation of the coast. One way was by the courts saying, as they said when the standard of a marine league was introduced, that whatever distance might be necessary to protect the shore should be assigned as the limit of territorial waters. The other way was legislation. Now legislation, remedial as it would be in such a case, ought not to be strictly construed; and the same may be said of other remedial legislation, such as statutes giving relief to debtors unduly pressed by the common law, and statutes relaxing the common law severity of pleading. On the other hand, there can be no doubt of the rightfulness of the position that a statute should not be construed, unless this be declared in express terms, to abrogate any one of the great principles of freedom and of justice settled by the common law.[2] Most of these principles are so amply protected by constitutional limitation that any attempts to impair them would be held nugatory on the ground of unconstitutionality. But supposing any one of these principles is not so sheltered, then nothing but the most express directions would induce the courts to sustain a statute by which it is impaired. This has been held to be the case with statutes authorizing trial by jury to be dispensed with;[3] and with statutes restricting, on technical grounds, the admission of evidence,[4] and with statutes providing for constructive service of writs.[5]—On the same general principle no statute will be construed as having extra-territorial force, unless such force be given to it by the law of nations.[6]

[1] *Supra*, § 186.

[2] *Infra*, § 615.

[3] Sedgwick, Stat. Laws, 271; Whart. Cl. Pl. & Pr., 8th ed., §§ 733, 819.

[4] Whart. on Ev., § 697.

[5] Gray *v.* Larrimore, 2 Abb. U. S., 542; see East Union *v.* Ryan, 86 Penn. St. 459; *supra*, §§ 344, 539.

[6] *Supra*, §§ 252 *et seq.* "Every statute is to be so interpreted and applied as far as its language admits, as not inconsistent with the comity of nations, or with the established rules of international law. Per Maule, J., in Leroux *v.* Brown, 22 L. J. C. P. 3; Bluntschli, Völkerrecht, s. 847; per Dr. Lushing-

§ 610. When the question is one of doubt, the courts will refuse to give a statute a retrospective

Statutes not to be construed

ton, in The Zollverein, Swab. 96. If, therefore, it designs to effectuate any such subject, it must express its intention with irresistible clearness, to induce a court to believe that it entertained it; for as long as any other possible construction remains, it would be adopted in order to avoid imputing such an intention to the legislature. Per Cur. in U. S. *v.* Fisher, 2 Cranch, 390; Murray *v.* Charming Betsey, 2 Cranch, 118. All general terms must be narrowed in construction to avoid it. Per Lord Stowell, in Le Louis, 2 Dods, 229." Maxwell on Stat., 122.

"It may be added, in connection with this topic, that as regards the question, how far statutes which confer rights are to be construed as extending to foreigners abroad, the authorities are less clear. It has been said, indeed, that when personal rights are conferred, and persons filling any character of which foreigners are capable are mentioned, foreigners would be comprehended in the statute. Per Maule, J., in Jeffreys *v.* Boosey, 4 H. L. 895. On the other hand, it has been laid down that, in general, statutes must be understood as applying to those only who owe obedience to the legislature which enacts them, and whose interests it is the duty of that legislature to protect; that is, its own subjects, including in that expression, not only natural born and naturalized subjects, but also all persons actually within its territorial jurisdiction; but that as regards aliens resident abroad, the legislature has no concern to protect their interests, any more than it has a legitimate power to control their rights. See per Jervis, C. J., in Jeffreys *v.* Boosey, 4 H. L. 946; per Lord Cranworth, id. 955; per Wood, V. C., in Cope *v.* Doherty, 27 L. J. Ch. 601; 4 K. & J., 367; comp. per Lord Westbury, in Routledge *v.* Low, L. R. 3 H. L. 100. In this view, it would be presumed, in interpreting a statute, that the legislature did not intend to legislate either as to their rights or liabilities, and to warrant a different conclusion, the words of the statute ought to be expressed or the context of it very clear. Per Turner, L. J., in Cope *v.* Doherty, 27 L. J. ch. 669; 2 De G. & J., 614.

"On this principle, mainly, it was held that the act of Anne, which gave a copyright of fourteen years to 'the author of any work,' did not apply to a foreign author resident abroad. Jeffreys *v.* Boosey, 4 H. L. 815; dubitante Lord Cairnes, in Routledge *v.* Low, L. R. 3 H. L. 100. The decision would probably have been different if the author had been in England when his work was published. Per Lord Cranworth, id. 955;" Maxwell on Stat., 127–8.

"In determining either what was the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason, and justice, should, in all cases open to doubt, be presumed to be the true one. An argument drawn from an inconvenience, it has been said, is forcible in law, Co. Litt. 97 *a*; and no less force is due to any drawn from an absurdity or injustice. The treaty between Louis XII. and the pope, which gave the king the right of appointing to 'all bishoprics vacated by the death of bishops in France,' was, for instance, properly construed, not as giving him the right of appointing to a foreign bishopric whenever its incumbent happened

as retrospective.

effect, when this works injustice.[1] In many cases, however, no injustice is worked by such statutes

to die in France, but, more consistently with good sense and convenience, as authorising him to fill the bishoprics of his own kingdom when their holders died, whether at home or abroad. Puff., L. N. b. 5, c. 12, § 8. If a statute gives an appeal from a magistrate's decision, 'when the sum adjudged to be paid on conviction shall exceed two pounds,' the question whether the penalty only, or the penalty plus the costs were intended, would be decided on similar general considerations of convenience and reason. It would be thought more likely that the legislature intended to give an appeal only when the offence was of some gravity, and not merely where the costs (which would vary according to the distances to be travelled by the parties and their witnesses, the number of the latter, and similar accidental circumstances) happened to swell the amount above the fixed limit. R. *v.* Warwickshire, 6 E. & B. 837; 25 L. J. M. C., 119;" Maxwell on Stat., 166–7.

Prof. Pomeroy (Sedgwick on Stat., 2d ed., 296), gives the following illustrations of "statutes derogating from common right, which are to be strictly construed:" "giving a preference in payments out of the county revenues, People *v.* Williams, 8 Cal. 97; requiring gratuitous services from any class of persons, Webb *v.* Baird, 6 Ind. 13; subjecting property to forfeiture for the offence of another person than the owner, such forfeiture cannot arise from implication, Ohio *v.* Stunt, 10 Ohio, N. S., 582; condemning private property for public use, Gilmer *v.* Lime Point, 19 Cal. 47; Curran *v.* Shattuck, 24 Cal. 427; Adams *v.* Saratoga R. R., 10 N. Y. 328; but not so literally as to defeat the object, N. Y. R. R. *v.* Kip, 46 N. Y. 546; providing that a passenger riding on the platform of a car, when there is room inside, shall have no claim for compensation in case of accident, Willis *v.* Long Island R. R., 32 Barb. 398; Hoag *v.* Peck, 62 Barb. 545; impressing property for public use, as in case of pestilence, Pinkham *v.* Dorothy, 55 Me. 135; authorising municipal aid to railroads; restraining trade or the alienation of property, Richardson *v.* Enswiler, 14 La. Ann. 668; excluding testimony, Pelham *v.* Messenger, 16 La. Ann. 99. The same is true of statutes conferring special privileges, as banking laws, State *v.* Chase, 5 Ohio, N. S., 528. Thus, when the act authorized the organization of a certain number of banks, and the authorized number were organized, and some of them afterwards ceased to do business, it was held, that no new ones could be organized to take their places. Ibid. A statute prescribing how a man shall build on his own land, with pains and penalties, should be scrutinized with great care. Stiel *v.* Mayor of Sunderland, 6 H. & N. 706."

[1] R. *v.* Ipswich, 2 Q. B. D. 269: Ogden *v.* Blackledge, 2 Cranch, 272; McEwen *v.* Den, 24 How. 242; Atkinson *v.* Dunlop, 50 Me. 111; Dash *v.* Van Kleeck, 7 Johns. 477; State *v.* Newark, 40 N. J. L. 92; Bedford *v.* Shilling, 4 S. & R. 401; Eakin *v.* Raub, 12 S. & R. 330; Carpenter *v.* Shimer, 24 Hun, 464; State *v.* Jersey City, 40 N. J. L. 257; James *v.* Rowland, 52 Md. 462; see Gable *v.* Scott, 56 Md. 176; Peters *v.* The Auditor, 33 Gratt. 368; State *v.* Ferguson, 62 Mo. 77; Reis *v.* Graff, 51 Cal. 86; Sturgis *v.* Hull, 48 Vt. 302; see Illinois Co. *v.* Bonner, 75 Ill. 315.

In what cases retrospective legisla-

operating retrospectively; and when this is the case, as in matters of change of procedure, a retrospective enactment will be sustained.[1]

Motives of legislators inadmissible, but intention to be sought from words

§ 611. The actual law-makers, whose intentions we have to ascertain in interpreting a statute, are not necessarily its formal law-makers. Laws, to be operative, as we have seen, must be declaratory of public sentiment;[2] and those who, as formal legislators, give technical expression to these laws, may sometimes not comprehend their bearing, and may sometimes misconstrue their meaning.[3] That this was the case in several important respects with the constitution of the United States has been already seen;[4] it is necessarily more or less the case with all legislation. There is no statute passed for which the arguments used by its advocates are not in some measure based on misapprehensions of its character, or on personal inferences from the attitude of opponents, or on special exigencies which do not by themselves explain the real character of the terms used. Hence it is inadmissible to appeal to the reports and speeches of legislators, made when discussing a bill, for the purpose of explaining the meaning of the bill.[5] The primary proof of the meaning of a statute is

tion is constitutional has been already considered, *supra*, §§ 470, 564 *et seq.* As a matter of course, when a statute or clause of a statute conflicts with the constitution, it fails. See Sedgwick on Stat. Law, 160, 173.

[1] Lane *v.* Nelson, 79 Penn. St. 407; Baldwin *v.* Newark, 38 N. J. L. 158; Tilton *v.* Swift, 40 Iowa, 78; and cases cited *supra*, §§ 473, 492.

[2] *Supra*, § 27.

[3] *Supra*, §§ 359, 360.

[4] *Supra*, § 596, note.

[5] *Supra*, §§ 359, 360, 596. In England it has been expressly ruled that the court will not listen to debates in parliament in order to determine the meaning of an act; R. *v.* Whittaker, 2 C. & K. 640; Gorham *v.* Bishop of Exeter, 5 Ex. 667; or even to the history of the progress of a clause through parliament. Barbat *v.* Allen, 7 Ex. 616; R. *v.* Capel, 12 A. & E. 382, 411; Donegall *v.* Layard, 8 H. L. C. 465, 472, 473; Atty.-Gen. *v.* Sillens, 2 H. & C. 521; Wilberforce on Stat., 106.

In this country, though in the opinions of judges the debates in the Federal constitution are sometimes appealed to as explanatory of the action of the convention, it has been ruled, when the question has come up for judicial decision, that motives of legislators cannot be inquired into for the purpose of explaining their legislative action. U. S. *v.* Un. Pac. R. R., 91 U. S. 72; Dist. of Col. *v.* Washing. Market, 3 McArth. 559; People *v.* Shepard, 36 N. Y. 285; Harpending

to be found in its text, though, as explanatory of this meaning, national antecedents and conditions, as will presently be seen, may be taken into consideration.[1]

And from national antecedents and conditions.

§ 612. When the meaning of a contract is to be determined, it is admissible, in order to solve latent ambiguities, *i. e.*, ambiguities as to the objects to which the words used by the parties relate, to put in evidence proof of such extrinsic facts as will enable the intention of the parties to be more fully brought out; and when these facts are of a public character, they will be taken notice of by the court without proof.[2] Among such facts are regarded the training of the parties; the meaning assigned by them to particular controverted words; the peculiar necessities to which either of them was at the time subjected. In the construction of wills a still greater latitude is, from the nature of things, permitted, it being the usage, when a testator's meaning as to the objects of his bounty is considered, to inquire not only into his means, but into his family relationships.[3] The same privilege of resorting to extraneous facts exists, *mutatis mutandis*, in the construction and interpretation of statutes. Statutes, as we have already seen, are the products of national conscience and necessities;[4] it is often impossible to adequately understand a statute without taking into account such conscience and necessities. Nations, also, form a continuous stream of generations, knit together like strands in a rope; no public act of a nation can be properly weighed without taking into consideration its past as well as its present, the traditions which it has inherited as well as the influences to which it may at the moment be subjected. And in the construction and interpretation of statutes, the courts,

v. Haight, 39 Cal. 189; State *v.* Hays, 49 Mo. 604; McCulloch *v.* State, 11 Ind. 424. Even the debates of a constitutional convention cannot, it is held, be adduced as explanatory of its action. Taylor *v.* Taylor, 10 Minn. 107. Nor can reports by which a bill is introduced, or reasons given by members in debate. U. S. *v.* Un. Pac. R. R., 91 U. S. 72.

[1] As to how intent is to be collected, see Sedgwick on Statutes, 193–7; State *v.* Brewster, 42 N. J. L. 125; Goldsmith *v.* R. R., 62 Ga. 463; Walton *v.* State, 62 Ala. 197; State *v.* Nicholls, 30 La. An., Part II., 1217.

[2] See *supra*, § 359.

[3] See Whart. on Ev., §§ 920 *et seq.*

[4] See *supra*, §§ 16 *et seq.*

either consciously or unconsciously, uniformly appeal to these sources of explanation. When the meaning of the terms used in the statutes of mortmain, for instance, has been litigated, the conscience of the English people, *i. e.*, the national repugnance to that which appears merely superstitious and ceremonial, and their necessities, *i. e.*, the injury to the public, produced by the withdrawal of land from the market and its concentration in ecclesiastical corporations, have been adverted to by the judges as explaining such of the provisions of the statutes as might be obscure, and as pointing out the object they were designed to meet. We may turn, also, as illustrating the same appeal by the courts, in order to get at the meaning of a statute, to the sense of right and the sense of need by which it was prompted, to the opinion of the judges of the supreme court of the United States on the legal tender statute, and on the constitutional amendments consequent on the late civil war. In the legal tender decisions, we have brought conspicuously before us, in the opinions rendered on both sides of the question before the court, (1) the determination then existing in the country to maintain its integrity, and (2) the dire straits to which at the time it was reduced. In the reconstruction decisions the opinions on both sides appeal in like manner to what was the national sense of right and national necessity prompting to the legislation under investigation.[1] It is true that no evidence was taken in either line of cases to show what were the national sense of duty and the national necessities at the period in which the legislation in question was enacted. Of these and kindred facts the courts took judicial notice.[2] And as the national conscience, or sense of right, which is so important a factor in legislation, is not an instantaneous emotion, but the product of ages of national training and national aptitudes, so the courts, in making up their opinion as to what a legislature intended, turn to national traditions and antecedents as an important element in determining such intentions.

[1] See, for citations, *supra*, § 593; and see further, *supra*, § 360.

[2] For cases illustrating judicial notice of this class, see Whar. on Ev., § 338.

Hence it is, that one statute may be explained by prior statutes and by the common law.[1] In fact there is no statute that can be understood without taking into consideration the pertinent history of the past. The past is not merely explanatory of the present. It is the base on which the present stands. And the reason why this examination of past and present conditions of the country is essential, is, as has been already noticed,[2] because, as a matter of fact, the real law-makers of a country are its people. Their legislation may be the work of centuries; it is, as a rule, instinctive and imperceptible in its progress; it moves not with debate, and issues no reports of its movements. But it speaks none the less articulately through the forces it represents and the stamp it impresses on customary common life.[3] And when we seek the meaning of a law, we must resort primarily to the consideration of these forces and this stamp. In other words, we must inquire as to the conditions and environments of the country at the time the law was evolving, and as to the customs in which it gradually took shape before legislative adoption.[3]

[1] *Infra*, § 616.

[2] *Supra*, §§ 14, 27.

[3] See Big Black Creek Co. *v.* Com., 94 Penn. St. 450; Baxter *v.* Tripp, 12 R. I. 310; Cearfoss *v.* State, 42 Md. 403. That history is to be appealed to in such cases, see U. S. *v.* R. R., 91 U. S. 72. That the journals of the legislature may be searched for this purpose, see Edger *v.* Randolph Co., 70 Ind. 331; see Dist. of Col. *v.* Washington Market Co., 3 McArthur, 559; see, also, illustrations in reconstruction opinions, *supra*, § 593.

"He (the interpreter) may seek it (the meaning of a statute), for example, in the reason of the statute, as indicated by the statute itself, or in the reason of the statute, as indicated by the history of the statute; or by the clear enactments of other statutes made by the same legislature *in pari materia*," Austin, Lect. xxxvii. "If those terms be of doubtful import, the *ratio* or scope of the statute (or even the history of the statute) may be used as an instrument or means for determining the doubtful import." Ib.

Sir Peter Maxwell, in his treatise on the interpretation of Statutes (London, 1875), thus speaks (p. 19): "As regards the history, or external circumstances connected with the enactment, the general rule which is applicable to the construction of all other documents is equally applicable to statutes, viz., that the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see what those words relate to. Extrinsic evidence of the circumstances or surrounding facts under which a will or contract was made, so far as they throw light on the matter to which the document relates, and of the condition and position of the persons who made it or are mentioned in it, is always admitted as indispensable for the pur-

§ 613. The position heretofore taken that statutes are only permanently operative when declaratory of existing conditions,

pose not only of identifying such persons and things, but also of explaining the language, whenever it is patently (latently) ambiguous or susceptible of various meanings or shades of meaning, and of applying it sensibly to the circumstances to which it relates. Wigram, Interp. Wills Prop. 5; Anstie *v.* Nelms, 26 L. J. Ex. 5; per Bramwell B.; Wood *v.* Priestner, L. R. 2, Ex. 70: Shortrede *v.* Cheek, 1 A. & E. 57; Bauman *v.* James, L. R. 3 Ch. App. 508; Doe *v.* Benyon, 12 A. & E. 431; Blundell *v.* Gladstone, 3 McN. & G. 692; Turner *v.* Evans, 2 E. & B. 515. Thus, when a charter party stipulates that 'detention by ice' is not to be reckoned among laying days, the meaning intended to be expressed by this term cannot be accurately determined without that knowledge of the circumstances of the port and trade which the parties possessed, or are conclusively presumed to have possessed; and evidence of these circumstances is received for the purpose of accurately construing the contract. Hudson *v.* Ede, L. R. 3 Q. B. 412; and see Behn *v.* Burness, 3 B. & S. 751, 32 L. J. Q. B. 207. When a vessel is warranted seaworthy, the meaning must vary with the nature, not only of the vessel but of the voyage; and evidence of these circumstances is admitted in order to ascertain the precise intention of the parties. In a lease of a house with a covenant to keep it in tenantable repair, it is necessary to ascertain whether it be an old one in St. Giles's or a palace in Grosvenor Square; for that which would be a repair of the one, might not be so of the other. On the sale of a horse warranted to go well in harness, the qualities of a good goer would be different in a pony fit to draw a lady's carriage and a dray horse; and it would therefore be necessary to inquire what was the kind of horse which was the subject of the warranty. See the judgment of Blackburn, J., in Burgess *v.* Wickham, 3 B. & S. 698, 33 L. J. Q. B. 28; Clapham *v.* Langton, 5 B. & S. 729, 34 L. J. Q. B. 46. Where a guarantee is worded in language equally applicable to a past and to a future credit, evidence would be admitted of the position of the parties at the time, in order to determine which was their real meaning. Goldshede *v.* Swan, 1 Ex. 154; Wood *v.* Priestner, L. R. 2 Ex. 66. So, in the interpretation of statutes, the interpreter must, in order to understand the subject matter and the scope and object of the enactment, call to his aid all those external and historical facts which are necessary for the purpose. Gorham *v.* Bishop of Exeter, rep. by Moore, p. 462. (See 5 Ex., 630.)

"In his celebrated judgment in the Alabama arbitration, Cockburn, C. J., showed, by a reference to their history, that both the American and English Foreign Enlistment Acts of the early part of the present century were intended not to prevent the sale of armed ships to belligerents, but to prevent American and English citizens from manning privateers against belligerents. Supplement to the London Gazette, 20 Sept. 1872, p. 4135.

"The 5 Geo. IV. c. 113, for the abolition of the slave trade, was construed as extending to offences committed by British subjects out of the British dominions, that is, on the west coast of Africa, by the light of the notorious fact that the crime against which the act was directed, was mainly, if not exclusively, committed there (R. *v.*

is illustrated by the treatment by the English courts of the older English statutes. When these statutes did not in their text fit into existing conditions they were stretched or contracted until a fit was approximated;

Authoritative exposition to be followed.

Zulueta, 1 Car. & K. 215); though it, perhaps, may not have extended to our subjects in other parts of the world beyond our territories. Per Bramwell, B., in Santos v. Illidge, 29 L. J. C. P. 348; 8 C. B. N. S. 861.

"An ordinance of the colony of Hong Kong, which authorized the extradition of Chinese subjects to the government of China, when charged with 'any crime or offence against the law of China,' was construed either by reference to the circumstances under which the treaty, which the ordinance enforced, had been made, or to the geographical relation of Hong Kong to China, as limited to those crimes which all nations concur in proscribing. Attorney-General v. Kwok-a-Sing, L. R. 5 P. C. 179, 197. An act which authorized the court before which a road indictment was preferred, to give costs, was construed as authorizing the judge at nisi prius to do so, partly on the ground of the well-known fact that such indictments were rarely tried by the court in which they were, in the strict sense of the word, 'preferred.' R. v. Pembridge, 3 Q. B. 901. Lord Westbury, when chancellor, referred to a speech made by himself, as attorney-general, in the house of commons, in 1860, in introducing the bankruptcy bill, which was passed into law in the following year; and one of his reasons in favor of the construction which he put on the act was that it tallied best with the intention which the legislature might be presumed to have adopted, as it was the ground on which application had been made to it. But he observed, at the same time, that he had endeavored, in forming his opinion, to divest his mind, as far as possible, of all impressions received from the past, and to consider the language of the act as if it had been presented to him for the first time in the case before him. *Re* Mew, 21 L. J. Bcy. 89. It is unnecessary to add that the external circumstances which may be thus referred to, do not justify a departure from every meaning of the language of the act. Their function is limited to suggesting a key to the true sense, when the words are fairly open to more than one."

An illustration of the position in the text may be found in the construction given the English statute, 26 Geo. II. c. 33, which declared all marriages of children under age void, unless the consent of the parents or guardians was first obtained. It became a question whether the act was to be interpreted to include illegitimate children; and Lord Mansfield, in holding that it did so, put his decision on the ground of the mischiefs which the act was intended to obviate: "This act was passed in order to prevent the illegal practice of clandestine marriages, which were become so very enormous, that places were set apart in the Fleet and other prisons for the purpose of celebrating clandestine marriages. The court of chancery, on the ground of its illegality, made it a contempt of the court to marry one of its wards in this manner. They committed the offenders to prison; but that mode of punishment was found ridiculous and ineffectual. Then this act was introduced to remedy the mischief." R. v. Hodnett, 1 T. R. 96.

and when circumstances changed, the law, to adopt Mr. Spence's statement,[1] was "accommodated to the altered state of society." But until the cotemporaneous construction put by a court having jurisdiction is overruled by circumstances, or becomes obsolete, it is authoritative as a judicial exposition;[2] and the same may be said of the action of the departments of government when applying a statute.[3] The United States courts, also, as we have seen, in construing a state statute, will take the construction imposed on it by the state courts,[4] and when a statute of one state is adopted by another, it will usually be accepted with the construction attached to it by the courts of the state of its original adoption.[5] And, as we have seen, when a title has been acquired in accordance with the decision of a state court as to a statute, the supreme court of the United States held that such title cannot be divested by the state court overruling its former decision.[6]

[1] *Supra*, § 30; and see Washington *v.* Murray, 4 Cal. 388, cited *infra*, § 621.

[2] See *supra*, § 30.

[3] The Abbotsford, 98 U. S. 440; Douglass *v.* Pike Co., 101 U. S. 677; Swift *v.* U. S., 14 N. & H. 481; State *v.* Whitworth, 8 Lea, 594; see *supra*, § 480. On this topic see generally District of Columbia *v.* Washington Market, 3 MacArthur, 559; and authorities cited to § 611.

[4] *Supra*, § 526.

[5] Myrick *v.* Hasey, 27 Me. 9; Adams *v.* Field, 21 Vt. 256; Com. *v.* Hartnett, 3 Gray, 450; see *supra*, § 480.

[6] *Supra*, § 480. How far questions of public policy may be considered in construing a statute, see Baxter *v.* Tripp, 12 R. I. 310. That journals of legislatures may be examined in view of meaning, see Edger *v.* Randolph Co., 70 Ind. 331; *supra*, § 603.

"It has been said, indeed, that usage is only the interpreter of a doubtful law, but cannot control the language of a plain one, and that if it has put a wrong meaning on unambiguous language, it is rather an expression of those concerned than an exposition of the act, and must be corrected. Id.; Vaugh., 170; and per Lord Brougham in Dunbar *v.* Roxburghe, 3 Ch. & F. 354. But this may depend materially on the nature of the usage. Where it has been of an authoritative character, and especially where the statute is an ancient one, the interpretations of usage have materially modified the meaning of apparently unequivocal language. Thus, the statute 1 Westm. c. 10, which enacts that coroners shall be chosen of the most legal and wise knights, has always been understood to admit of the election of coroners who were not knights. 2 Hawk., c. 9, s. 2. Though the 15 Rich. II. enacted that the admiralty should have no jurisdiction over contracts made in the bodies of countries, seamen engaging in England have nevertheless always been admitted to sue for wages in that court, Smith *v.* Tilley, 1 Keb. 712, where the remedy is easier and better than in the common law courts; on the ground, it

§ 614. When the literal meaning of a statute is not unreasonable, it is to be followed in preference to a more remote

has been said, per Lord Holt in Clay *v.* Sudgrave, 1 Salk. 33, that communis error facit jus." Maxwell on Stat., 722.

In State *v.* Glenn, Sup. Ct. Nev., 1883 (West Coast. Rep., vol. i. No. 1), the authorities on this point are thus grouped:—

"The supreme court of the United States, when the power of the judges of that court to sit as circuit judges was called in question, said: 'To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. . . . . The question is at rest, and ought not now to be disturbed.' Stuart *v.* Laird, 1 Cranch, 308.

"In Georgia, when the question was raised as to the power of the governor of that state to veto bills after the adjournment of the legislature was called in question, the court said: 'If this was an original question, independent of any construction heretofore given by the executive department of the state government, to this clause of the constitution, we should be inclined to hold that the governor could not approve and sign any bill after the adjournment of the general assembly; but on looking into the past history of our legislation, we find that it has been the practice for many years for the governor to take five days after the adjournment of the general assembly for the revision of bills passed by that body, and to approve and sign the same within that time, . . . and that a large number of the most important acts now upon the statute books of the state have been so approved and signed, which usage and practice of the executive department of the state government should not now, in our judgment, be disturbed or set aside.' Solomon *v.* Commissioners, 41 Ga. 161.

"The supreme court of Pennsylvania, in discussing the power of the legislature, under the provisions of the constitution of that state, to enlarge the privileges of corporations, said: 'This construction is not unsupported by authority. It has not, indeed, received the direct sanction of any express judicial decision. But the legislature, with many members of the convention in it, has always acted upon this interpretation. *And this has been done with the silent acquiescence of all the people, including the legal profession and the judiciary.* The defendant's counsel has produced us a list of two hundred and seventy-nine acts of assembly, passed only within the last four years, creating one and enlarging the powers of another corporation, or enlarging the powers of two corporations, both municipal and private. Some thousands of such laws have probably been passed since 1838. If we now declare them to be unconstitutional, and sweep away at once all the rights, public and private, which have been acquired under them, we must do an amount of mischief which no man's arithmetic can calculate. This is a proper element of legal judgment on such a subject. We are not to overlook the practice of the legislature, or disregard the consequence of doing so.' Moers *v.* City of Reading, 21 Pa. St. 202.

"To the same effect: Bingham *v.* Mil-

and conjectural meaning which may appear to the court more reasonable. The question of greater or less reasonableness is for the legislature and not for the court.[1] But a literal meaning, when manifestly based on a clerical error, may be set aside.[2] Nor will it be sustained, when the general construction is doubtful, in cases where such literal meaning would work gross injustice.[3]

Literal meaning when reasonable to be taken.

ler, 17 Ohio, 448; Johnson *v.* Joliet & C. R. R. Co., 23 Ill. 207; Scanlan *v.* Childs, 33 Wis. 666; Cronise *v.* Cronise, 54 Pa. St. 263; Commissioners *v.* Higginbotham, 17 Kan. 80.

"These cases are quoted and cited as declaring principles which should govern courts where doubts exist as to the proper construction of the constitution. It is only in cases where the provisions of the constitution are free from doubt that courts follow 'the fundamental law as it is written, regardless of consequences.' In such cases, courts have frequently declared that the argument *ab inconvenienti* should not 'bend the constitution to suit the law of the hour.' We agree with Judge Cooley that 'we allow the contemporary and practical construction its full legitimate force, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be continued.' Cooley's Const. Lim., 71, and authorities there cited."

[1] State *v.* Brewster, 42 N. J. L. 125.

[2] People *v.* Hoffman, 97 Ill. 234.

[3] *Supra*, § 609; *infra*, § 614. "Statutes which encroach on rights of the subject, whether as regards person or property, receive a strict construction. Thus, the act 21 Edw. I., de male factoribus in parcis, which authorized a parker to kill trespassers in his park, and who refused to yield to him, was construed as strictly limited to a legal park, that is, one established by prescription or royal charter, and not merely one by reputation. 1 Hale, 491: 3 Dyer, 326 *b*.

"A harbor act, which imposed a penalty on 'any person' who placed articles 'on any quay, wharf, or landing place, within ten feet from high-water mark' so as to obstruct the free passage over it, was held to apply only to ground over which there was already a public right of way, but not to private property not subject to any such right, and in the occupation of the person who placed the obstruction on it. Harrod *v.* Worship, 1 B. & S. 381; 30 L. J. M. C. 165; diss. Wightman, J." Notwithstanding the comprehensive nature of the general terms used, it was not to be inferred that the legislature contemplated such an interference with the rights of property as would have resulted from construing the words as creating a right of way." —Maxwell on Stat., 257.

In Lieber's Hermeneutics (p. 120) we have the following:—

"1. A sentence or form of words can have but one true meaning.

2. There can be no sound interpretation without good faith and common sense.

3. Words are, therefore, to be taken as the utterer probably meant them to be taken. In doubtful cases, therefore, we take the customary significa tion, rather than the grammatical or classical, the technical rather than the etymological—verba artis ex arte—tropes as tropes. In general, the

When meaning is in doubt

§ 615. When there are two conflicting constructions of a statute, and when the arguments for these

words are taken in that meaning which agrees most with the character of both the text and the utterer.

4. The particular and inferior cannot defeat the general and superior.

5. The exception is founded upon the superior.

6. That which is probable, fair, and customary, is preferable to the improbable, unfair, and unusual.

7. We follow special rules given by proper authority.

8. We endeavor to derive assistance from that which is more near, before proceeding to that which is less so.

9. Interpretation is not the object, but means; hence superior considerations may exist."

The following rules are given on p. 144 *et seq*:—

"1. All principles of interpretation, if at all applicable to construction, are valid for the latter.

2. The main guide for construction is analogy, or rather reasoning by parallelism.

3. The aim and object of an instrument, law, etc., are essential, if distinctly known in construing them.

4. So, also, may be the causes of a law.

5. No text imposing obligations is understood to demand impossible things.

6. Privileges or favors are to be construed so as to be least injurious to the non-privileged or unfavored.

7. The more the text partakes of the nature of a compact, or solemn agreement, the closer ought to be its construction.

8. A text imposing a performance, expresses a minimum if the performance is a sacrifice to the performer; the maximum if it involves a sacrifice or sufferance on the side of the other party.

9. The construction ought to harmonize with the substance and general spirit of the text.

10. The effects which would result from one or the other constructions, may guide us in deciding which construction we ought to adopt.

11. The older a law, or any text containing regulations of our actions, though given long ago, the more extensive the construction must be in certain cases.

12. Yet nothing contributes more to the substantial protection of individual liberty, than a habitually close interpretation and construction.

13. It is important to ascertain whether words were used in a definite, absolute, and circumscribed meaning, or in a generic, relative, or expansive character.

14. Let the weak have the benefit of a doubt, without defeating the general object of the law. Let mercy prevail, if there be real doubt.

15. A consideration of the entire text, or discourse, is necessary in order to construe fairly and faithfully.

16. Above all, be faithful in construction. Construction is the building up with given elements, not the forcing of extraneous matter into text."

On pp. 167 *et seq.*, the following are given as rules applicable to interpretation in general:—

"1. The true meaning of the words can be but one.

2. Honest, faithful, *bona fide* interpretation is all important; common sense must guide us.

3. Words are to be taken according

constructions are evenly balanced, the construction will be preferred which is fairest and most generally

that which is fairest and most

to their customary, not in their original or classical signification.

4. The signification of a word, or the meaning of a sentence, when dubious, is to be gathered from the context, or discovered by analogy, or fair induction. Yet the same word does not always mean the same in the same discourse or text. This would, in fact, militate with the important rule, that we are to take words in their natural sense, according to custom and their connection.

5. Words are always understood as having regard to the subject matter.

6. The causes which led to the enactment of a law are guides to us. If one interpretation would lead to absurdity, the other not, we must adopt the latter. So, that interpretation which leads to the more complete effect which the legislature had in view, is preferable to another.

7. Two chief objects of all government are peace and security; the state can never be understood to will anything immoral, so long as there is any doubt. Laws, therefore, cannot be construed as meaning anything against the one or the other. Security and morality are the supreme law of every land, whether this be expressly acknowledged or not

8. The general and superior prevails over the specific and inferior; no law, therefore, can be construed contrary to the fundamental law. If it admits of another construction, this must be adopted. . . .

9. A law contrary to the fundamental or primary law, may at any time be declared so, though it has already been acted upon; for that which was wrong in the beginning cannot become valid in the course of time. Dig. L. 50, Tit. 17, 24. . . .

10. If, therefore, the law admits of two interpretations, that is to be adopted which is agreeable to the fundamental or primary law, though the other may have been adopted previously.

11. Custom of the country, where the law was made, supplies the deficiency of words.

12. In dubious cases, the fairer interpretation is to be adopted. 'Everywhere, especially in law, equity is to be considered.' Dig. L. 50, Tit. 17, 90, 192, 200.

13. That which is probable, or customary, is preferable to that which is less so, wherever obscurity exists. If two laws conflict with each other, that must yield the effect of which is less important, or,

14. That is to be adopted, by the adoption of which we approach nearest to the probable or general intention of the legislature. Specific rules, adopted for the protection of private individuals, must be followed. . . .

15. The more general the character of the law is, the more we ought to try strictly to adhere to the precise expression. Without it, it would be a wavering instead of a stable rule; we must presume that the words have been the better weighed. Many considerations, however, may exist, which would oblige us to follow a different course, *e. g.*, the cruelty of a law, its antiquity, and consequent unfitness.

16. If any doubt exists in penal laws or rules, they ought to be construed in favor of the accused; of course, without injury to ony one else.

17. In cases of doubt between the authority and an individual, the bene-

beneficial preferred.

beneficial. It is not to be presumed, in a case thus in equilibrum, that the legislature meant to impose the construction which would be unfair or harmful.[1] And when general terms are used, such terms, unless restricted, will be allowed their full significance.[2]

fit of the doubt, all other reasons being equal, ought to be given to the individual, not to the authority, for the state makes the laws, and the authority has the power; yet it is subversive of all good government, peace, and civil morality, if subtlety is allowed to defeat the wise object of the law, or if a morbid partiality for an evil doer guides the interpreter.

18. The weak (hence the individual arraigned by the state) ought to have the benefit of doubt; doubt ought to be construed in mercy, not in severity. A law may be rendered milder, but not more severe."—See Sedgwick Stat. Law, 246.

[1] Wilkinson *v.* Leland, 2 Pet. 627; Rutherford *v.* Maynes, 97 Penn. St. 78; Regents *v.* Williams, 9 Gill & J. 365; Bowman *v.* Middleton, 1 Bay, 252; Goshen *v.* Stonington, 4 Conn. 209.

[2] Hermance, *in re*, 71 N. Y. 481; see Wood *v.* R. R., 72 N. Y. 92; see *supra*, § 321.

"Whenever the language admits of two constructions, according to one of which the enactment would be unjust, absurd, or mischievous, and according to the other it would be reasonable and wholesome, it is obvious that the latter must be adopted as that which the legislature intended; per Lord Campbell in R. *v.* Skeen, 28 L. J. M. C., 98; Bell, 97; per Keating, J., in Boon *v.* Howard, L. R. 9, C. P. 308. Thus, where a by-law authorized the Poulterer's Company to fine 'all poulterers in London, or within seven miles around,' who refused to be admitted into their company, it was held, that inasmuch as no poulterer could legally belong to the company who was not also a freeman of the city, the by-law was to be construed as limited to those poulterers who were also freemen, to avoid the injustice of punishing men for refusing to enter into a company to which they could not legally belong. Poulter's Company *v.* Phillips, 6 Bing., N. C. 314. So in the sections 112 and 198 of the Bankrupt Act of 1849, which protected a bankrupt from arrest by his 'creditors,' this word was construed as limited to those creditors who had debts provable under the bankruptcy; for it would have been obviously unjust, and was therefore presumably not intended that his certificate should protect a bankrupt not only against those creditors who had, or might have proved under the bankruptcy, but against creditors whose claims were not barred by it. Grace *v.* Bishop, 11 Ex. 424; Phillips *v.* Poland, L. R. 1 C. P. 204; *Re* Poland, L. R. 1 Ch. App. 356; Williams *v.* Rose, 3 L. R. Ex. 5, per Bramwell, B. A statute which enacts that a person who has been convicted by justices of an assault, and has suffered the punishment awarded for it, shall be released from all other proceedings for manslaughter, if the party assaulted afterwards died from the effects of the assault, such a construction would defeat the ends of justice. R. *v.* Morris, L. R. 1 C. C. 90. An act which imposed a penalty on any sheriff or bailiff who carried a person arrested for debt to prison for twenty-four hours, though it might render the former

§ 616. In construing a statute we must resort to the common law for the purpose of catching the distinction which the statute may be supposed to have established. Unless a statute is on its face declaratory, it must be presumed that it was intended to effect a change in the law, and to understand this change, we must ask what the law previously was. It is to be presumed, also, that the legislature acted in view of other statutes bearing on the same topic, and one statute will not be construed as overlapping another. It may happen, also,

Common law and other statutes to be taken into consideration.

liable for the act of the latter, his servant, as well as for his own, would not be construed to admit of his being sued after the penalty had been recovered from the bailiff; for this would be to give the plaintiff a second penalty for the same act, after he had been compensated by the first, and would, indeed, make the bailiff liable to pay twice, as he would be bound by the usual bond to indemnify the sheriff. Peshall *v.* Layton, 2 T. R. 712. An act (5 & 6 Vict., c. 39, § 6) which protected a fraudulent agent from conviction, if he 'disclosed' his offence on oath, in any examination in bankruptcy, was held not to include a confession made there after commitment by a magistrate, and which was in substance only a repetition of the facts proved later; on the ground that it would have been absurd and mischievous to enable a man to provide an indemnity for himself, by simply making a statement of facts already known and provable aliunde, and not in any way advancing either civil or criminal justice by the alleged 'disclosure.' R. *v.* Skeen, Bell 97; 28, L. J. M. C. 91. So held by nine judges against five."—Maxwell on Statutes, 179-181.

"It is to be borne in mind that the injustice and hardship which the legislature is presumed not to intend, is not merely such as may occur in individual and exceptional cases only. Laws are made adea quæ frequentius accidunt (Dig. i. ix. 3–10), and individual hardship not unfrequently results from enactments of general advantage. The argument of hardship has been said to be always a dangerous one to listen to. Per Curiam, in Munro *v.* Butt, 8 E. & B. 754. It is apt to introduce bad law (per Rolfe, B., in Winterbottom *v.* Wright, 10 M. & W. 116; Brand *v.* Hammersmith R. Co., L. R. 2 Q. B. 241; Adams *v.* Graham, 33 L. J. Q. B. 71), and has occasionally led to the erroneous interpretation of statutes. Comp. ex. gr., Perry *v.* Skinner, 2 M. & W. 471, with R. *v.* Mill, 10 C. B. 379, 1 L. M. & P. 695; and R. *v.* Shiles, 1 Q. B. 919; and Welch *v.* Nash, 8 East, 394, with R. *v.* Phillips, 35 L. J. M. C. 217, L. R. 1 Q. B. 648. Courts must look at hardships in the face rather than break down the rules of law (per Lord Eldon in the Berkeley Peerage, 4 Camp. 419; and in Jesson *v.* Wright, 2 Bligh, 55); and if, in all cases of ordinary occurrence the law, in its natural construction, is not inconsistent, or unreasonable, or unjust; that construction is not to be departed from merely because, in some particular case, it may operate with hardship or injustice; see per Parker, B., in Miller *v.* Salomons, 21 L. J. Ex. 192."—Maxwell on Stat., 183.

that a statute may be in some sense supplementary to prior statutes, on which its meaning may depend. The assumption is that the statutes already in existence, form, in connection with the common law, a symmetrical system; and every distinct statute that comes up for consideration must be construed so as to make it fit into this system. It must not be extended, unless required by the terms of the enactment, so as to cover ground covered by other statutes, or by the common law. It will not be read so as to conflict with other statutes unless it was intended to repeal such statutes, or to occupy their ground.[1] And its particular purpose will be effected in accordance with the general system of common law and of statutes of which it is part.[2]

Common law to be invoked to help out statute.

§ 617. In some of our states an effort has been made to build up a jurisprudence which is exclusively statutory. It is impossible, however, for such an effort to be successful. There is no word that can be used in a statute in defining which it is not necessary to appeal to the common law. Even should a statute be passed to the effect that the common law should cease to be in force, we should have to resort to the common law to determine what the common law is. There is no term of law that cannot be cited as an illustration to the same effect. The Federal courts, it is declared, have no common law criminal jurisdiction, yet there is no Federal statute prescribing a penalty for a crime in which the courts are not compelled to resort to the common law to determine what the statute means.[3] In England, and in some jurisdictions in this country, the supplementary functions of the common law in

[1] *Infra*, § 623.

[2] That statutes forming part of the same system are to be taken together, see Whart. on Ev., § 980, *a*; Ailesbury *v.* Pattison, 1 Dougl. 98; Com. *v.* Algar, 7 Cush. 53; Com. *v.* Montrose, 52 Penn. St. 391; Nunes *v.* Wellisch, 12 Bush, 363; Huber *v.* Reily, 53 Penn. St. 112; Flanders *v.* Merrimack, 48 Wis. 567; Gibbons *v.* Brittenum, 56 Miss. 232; Scheftels *v.* Tabert, 46 Wis. 439. That the common law is to be appealed to, to explain the words of statutes even when not accepted in the jurisdiction as the basis of jurisprudence, see *supra*, § 114; *infra*, § 617. See, generally, Lieber, Herm. ch. v. That the last statute, in case of conflict, is to prevail over preceding statutes, see *infra*, § 623; Sedgwick's Stat. Law, 353.

[3] *Supra*, § 114.

this relation are extended still further; and it is held that where an act is prohibited by statute, but no penalty is prescribed, then a common law penalty can be inflicted on a party committing the prohibited act. Even when, in a subsequent clause of the statute, a pecuniary penalty is imposed on the act, this does not exclude indictment and punishment at common law; though it is otherwise when it appears from the statute that the statutory penalty is to be exclusive, as where the penalty is assigned to the offence in the clause by which the offence is created.[1] As instances of the annexation of common law incidents to statutory offences may be mentioned the application of the common law distinction of principal and accessory to statutory felonies, though the statute is silent as to such distinction;[2] and the adoption under statutes of the common law definition of robbery,[3] and of piracy.[4]

[1] Whart. Crim. Law, 8th ed., § 26; and see *infra*, § 625.

[2] R. *v.* Mazeau, 9 C. & P. 676; State *v.* Ricker, 29 Me. 84; Hughes *v.* State, 12 Ala. 458. As to like doctrine in respect to misdemeanors, see R. *v.* Button, 11 Q. B. 929.

[3] Whart. Crim. Law, 8th ed., § 847.

[4] *Supra*, § 200.

Statutes frequently make indictable common law offences, describing them in short by their technical name, *e. g.*, "burglary," "arson." No one would venture to say that in such cases indictments would be good charging the defendants with committing "burglary" or "arson."

A statute may be one of a system of statutes, from which, as a whole, a description of the offence must be picked out. Thus a statute makes it indictable to obtain negotiable paper by false pretences. But what are "false pretences"? To learn this we have to go to another statute, and this statute, it may be, refers to another statute, giving the definition of terms. No one of these statutes gives an adequate description of the offence, nor can such description be taken from them in a body. It is inferred from the common law.

A statute on creating a new offence describes it by a popular name. It is made indictable, for instance, to obtain goods by "falsely personating" another. But no one would maintain that it is enough to charge the defendant with "falsely personating another." So far from this being the case, the indictment would not be good unless it stated the kind of personation, and the person on whom the personation took effect. An act of congress, to take another illustration, makes it indictable to "make a revolt," but under this act it has been held necessary to specify what the revolt is. U. S. *v.* Almeida, Whart. Prec. 1061. "Fraud" in elections, in a Pennsylvania statute, is made indictable; but the indictment must set out what the fraud is. Com. *v.* Miller, 2 Pars. 480. It is not enough to say that the defendant "attempted" an offence, though this is all the statute says; the particulars of the attempt must be given. "Not a qualified voter," in a statute, must be expanded

§ 618. It is frequently said that penal statutes are to be strictly, remedial statutes liberally, construed. This is certainly true so far as it is involved in the position that there should be no conviction of a criminal charge, unless each material incident of the defendant's guilt should be proved beyond reasonable doubt, and among such incidents is the applicability to his case of a statute under which he may happen to be indicted. In addition to this we are to apply in all cases of construction the rule *in dubio mitius*. Hence, when it is doubtful whether the statute imposes a penalty, the conclusion, if the question is in equilibrium, must be in the negative; when the question whether a remedy is supplied is in equilibrium, the decision must be in the affirmative.[1]

Penal statutes to be strictly construed.

§ 619. A grant of franchises heretofore residing in the public, *e. g.*, the right to establish a ferry over a particular stream, of the right to sell a particular commodity to the exclusion of others, will be strictly construed as one which diminishes public rights.[2] Specification of franchises, also, in a statute granting a charter will, it has been held, only be construed to convey such powers as are necessary in the due course of business to the exercise of such franchises.[3]

So of grants of franchises.

in the indictment by showing in what the disqualification consists.

The terms of a statute may be more broad than its intent, in which case the indictment must so differentiate the offence (though this may bring it below the statutory description) as may effectuate the intention of the legislature.

An offence, when against an individual, must be specified as committed on such an individual, when known, though no such condition is expressed in the statute; though it is otherwise with nuisances, and offences against the public. Whart. Crim. Pl. & Pr., § 221.

[1] See Whart. Crim. Law, 8th ed., §§ 28 *et seq.*; Wood *v.* R. R., 72 N. Y. 196; State *v.* Jaeger, 63 Mo. 403; West. Un. Tel. Co. *v.* Axtell, 69 Ind. 199; see for contrary view, in Kentucky, Com. *v.* Davis, 12 Bush, 240.

That penal statutes are not extra-territorial, see *supra*, §§ 246, 609.

[2] *Supra*, § 483; Sedgwick on Stat. Law, 242; citing Lees *v.* Manchester, etc. Canal Co., 11 East, 652; Dock Co. *v.* Browne, 2 Barn. & Ad. 43; Providence Bank *v.* Billings, 4 Pet. 514; Parker *v.* R. R., 19 Penn. St. 211.

[3] Whart. on Cont., § 137, and cases there cited; and see discussion, *supra*, §§ 483, 484, 595.

See, as sustaining text, People's Ins. Co. *v.* Hartshorne, 84 Penn. St. 453;

§ 620. When an act is forbidden as penal by statute, then, in jurisdictions in which the common law is in force, such act is indictable as a misdemeanor, even though it be not made specifically indictable by the statute.[1] So the imposition by statute of a penalty by itself implies a prohibition, though the penalty may be the only sanction that can be exacted on the statute.[2] And where an offence indictable at common law has by statute a penalty by independent procedure attached to it, then the new remedy is regarded as cumulative, and both remedies may be pursued.[3] It is otherwise, however, with respect to offences which are exclusively statutory. In this case, if a statutory sanction is imposed, it must be exclusively followed.[4] Where, also, a penalty is imposed, as is the case sometimes with tax laws, as indicating merely an election to do a thing in a particular way or day or suffer the penalty, then the statute is to be regarded as giving the election between two

Prohibition implies penalty, and penalty prohibition.

East Union *v.* Ryan, 86 Penn. St. 459: Rutherford *v.* Maynes, 97 Penn. St. 78; Sedgwick, Stat. Law, 291–6.

That a legislative grant will be construed so as not to injure third parties, see Pittsburgh R. R. *v.* South W. R. R., 77 Penn. St. 173.

In Hughes *v.* R. R. (1 West Coast Reporter, 26) we have the following from Deady, J. :—

"It is admitted that the act incorporating the defendant is a public grant, which is not to have effect beyond what is plainly expressed or clearly implied therein, or contrary to the manifest purpose of it. Any material doubt or ambiguity in its terms or provisions must be resolved against it and in favor of the public. Nothing is to be taken as conceded but what is granted in plain terms, or by clear or necessary implication. Coolidge *v.* Williams, 4 Mass. 144; Charles River Bridge *v.* Warren Bridge, 11 Pet. 544, 600; Perrine *v.* C. & D. Canal Co., 9 How. 192; Fertilizing Co. *v.* Hyde Park, 97 U. S. 666; Burns *v.* Multnomah R'y Co., 8 Saw. 553; Wells, Fargo & Co. *v.* O. R. & N. Co., 8 Saw. 616; Cooley's C. L. 394."

[1] R. *v.* Davis, Say. 163: R. *v.* Gregory, 2 N. & M. 478; R. *v.* Sainsbury, 4 T. R. 451; Com. *v.* Shattuck, 4 Cush. 141; Kellar *v.* State, 11 Md. 525, and other cases cited; Whart. Crim. Law, 8th ed., § 24.

[2] Bensley *v.* Bignold, 4 B. & Ald. 355; State *v.* Fletcher, 5 N. H. 257.

[3] R. *v.* Robinson, 2 Burr. 799, and cases cited; Whart. Crim. Law, § 26; Whart. Cr. Pl. & Pr., §§ 232–81; but see State *v.* Boogher, 71 Mo. 631.

[4] R. *v.* Wright, 1 Burr. 543; R. *v.* Wigg, 2 Salk. 460; People *v.* Stevens, 13 Wend. 341; State *v.* Maze, 6 Humph. 17. That there may be a civil action in such cases, see Whart. on Cr. Pl. & Pr., § 453; Couch *v.* Steel, 3 El. & B. 402; Atkinson *v.* R. R., L. R., 6 Ex. 404.

lines of conduct, and not as affixing to either the stamp of wrongfulness.[1]

Titles may explain object.

§ 621. Titles to statutes were in old times assigned arbitrarily without any necessary connection with the statute to which they were prefixed.[2] The title was at the most regarded as only a formal part of the statute,[3] and in some jurisdictions was not regarded as belonging to the statute at all.[4] But, in any view, it was held that the title might be resorted to as throwing light, however faint, on the statute's meaning.[5] Since, however, the general adoption of the constitutional provisions requiring the character of a bill to be designated in the title, titles have acquired additional importance in explaining the meaning of a bill, as it is no longer likely that a title, under such a limitation, would be thrown in merely as a chance designation.[6] But under these constitutional limitations titles will be liberally construed, and no merely technical discrepancy will be held to be a variance when there is a substantial uniformity.[7] It is sufficient, under these limitations, if the title gives a notice of the character of the bill sufficient to put any person seeking for its contents on inquiry.[8]

[1] See Smith *v.* The Creole, 2 Wall., Jr., 485.

[2] See on this topic a paper by Judge Rose, Am. Law Rev., July–Aug., 1883.

[3] Hadden *v.* Collector, 5 Wall. 107; Burgett *v.* Burgett, 1 Ohio, 469.

[4] See Field *v.* Gooding, 106 Mass. 310.

[5] U. S. *v.* Palmer. 3 Wheat. 610; Williams *v.* Williams, 4 Seld. 524; Comm'rs *v.* Slifer, 53 Penn. St. 71; Davidson *v.* Clayland, 1 Harr. & J. 546; Nazro *v.* Ins. Co., 14 Wis. 295; Barnes *v.* Jones, 51 Cal. 603.

[6] See Penna. R. R. *v.* Riblet, 66 Penn. St. 164; Eby's App., 70 Penn. St. 311.

[7] People *v.* Briggs, 50 N. Y, 553; Middleton, *ex parte*, 82 N. Y. 199; State *v.* Hammer, 42 N. J. L. 435; Miller *v.* State, 3 Ohio St.4 75; Howland Coal Co. *v.* Brown, 13 Bush, 681; *supra*, § 603.

[8] Boyd *v.* Alabama, 94 U. S. 645; People *v.* Lawrence, 41 N. Y. 123; Mayer, *ex parte*, 50 N. Y. 507; Hurlburt *v.* Banks, 52 How. Pr. 196; People *v.* Banks, 67 N. Y. 568; Brooklyn Bridge, *ex parte*, 72 N. Y. 527; *supra*, § 603; Allegheny Home's Ap., 77 Penn. St. 77; Parkinson *v.* State, 14 Md. 184; Goldsmith *v.* R. R. Co., 62 Ga. 473, 485; State *v.* Covington, 29 Ohio St. 102; Johnson *v.* People, 83 Ill. 431; Harrington *v.* Wands, 23 Mich. 385; Frost *v.* Wilson, 70 Mo. 664; Boston Mining Co., *in re*, 51 Cal. 624.

That titles of laws do not control the meaning of their contents, see People *v.* Compagnie Générale, 107 U. S. 59; *supra*, § 421. In Walker *v.* Caldwell,

§ 622. A preamble may be in ordinary cases resorted to in explanation of the enacting clauses of a statute, supposing that the statute is in itself ambiguous. In such case the preamble may be regarded as any other independent fact,[1] but, like other independent facts, is susceptible of parol explanation. The true meaning of the statute is to be drawn from its body subject to the limitations above given; and from the fact that preambles are generally attached for the purpose of stating some probable incidental effect of the bill proposed rather than its logical scope, they cannot, as a rule, be regarded as giving a summary of its meaning. They have no direct legislative effect as part of the statute; they should not be allowed to work indirectly by modifying the enacting clauses.[2] But while they cannot be allowed to have a binding effect on the enacting clauses, they can be used argumenta-

Preamble not conclusive.

4 La. An. 297, we have the following: "The title of an act often afforded no clue to its contents. Important general principles were found placed in acts private or local in their operations; provisions concerning matters of practice or judicial proceedings were sometimes included in the same statute with matters entirely foreign to them; the result of which was, that on many important subjects the statute law had become almost unintelligible, as they whose duty it has been to examine or act under it can well testify. To prevent any further accumulation to this chaotic mass was the object of the constitutional provision under consideration." See, also, Succession of Lanzetta, 9 La. Ann. 329; see, also, Lafon v. Dufrocq, ibid. 350. To same effect see Davis v. State, 7 Md. 151. On the other hand, in California, the supreme court thus speaks: "We regard this section of the constitution as merely directory, and if we were inclined to a different opinion, would be careful how we lent ourselves to a construction which must in effect obliterate almost every law from the statute book, unhinge the business, and destroy the labor of the last three years. The first legislature that met under the constitution seems to have considered this section as directory, and almost every act of that and the subsequent sessions would be obnoxious to this objection. The contemporaneous exposition of the first legislature adopted or acquiesced in by every subsequent legislature, and tacitly assented to by the courts, taken in connection with the fact that rights have grown up under it so, that it has become a rule of property, must govern our decision." Washington v. Page, 4 Cal. 388.

[1] Crespigny v. Wittenoom, 4 T. R. 790.

[2] See U. S. v. Briggs, 9 How. U. S. 351; Holbrook v. Holbrook, 1 Pick. 248. That a preamble cannot extend the enacting clause, see Wilson v. Knubley, 7 East, 128; Lothrop v. Stedman, 42 Com. 583; Com. v. Smith, 76 Va. 477; Dwarris on Stat., 2d ed., 504.

tively for the purpose of explaining those clauses in cases of doubt.[1]

[1] See Lieber's Hermeneutics (3d ed.), 116; Hardcastle on Stat. 96. In Hughes *v.* R. R., 1 Dr. & Sm. 532, Channell, B., said: "It is a well-established rule that effect is to be given to the clear words of an enacting clause, though they may go far beyond the language of the preamble—that is, that where the words of an enacting clause are clear and explicit, then their natural and obvious meaning shall not be restricted or cut down by the use of language of less extensive import in the preamble. If, then, the words of the enacting clauses, taken together, are words admitting, according to their natural import, but of one meaning, they must prevail, notwithstanding an argument to the contrary otherwise derivable from the preamble. If, on the other hand, the words are not so clear and explicit as to admit of but one clear and distinct meaning, but reasonable effect may be given to the words used in the enacting clauses by applying to them another meaning, then I apprehend that the preamble may be looked at too with light upon the subject."

So it was said by Lord Tenterden that "In construing acts of parliament, we are to look not only at the language of the preamble or of any particular clause, but at the language of the whole act. And if we find in the preamble or in any particular clause an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act we can collect from the more large and extensive expressions used in other parts the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble or in any particular clause." Bywater *v.* Brandling, 7 B. & C. 660. See Robinson *v.* Collingwood, 17 C. B. (N. S.) 777; Harding *v.* Williams, 14 Ch. D. 197. See 18 Cent. L. J., 27.

"The influence of the preamble has a foundation in the exposition of every code of written law, upon the universal principle of interpretation, that the will and intention of the legislature is to be regarded and followed. The preamble is properly referred to when doubts or ambiguities arise upon the words of the enacting part. The preamble can never enlarge; it cannot confer any powers *per se*. Its true office is to expound powers conferred; not substantially to create them." Story, Com. Const. cited Sedgwick on Stat. 43, citing further, Crespigny *v.* Wittenoom, 4 T. R. 790; Edwards *v.* Pope, 4 Ill. 465. "The preamble to a statute," says the supreme court of Illinois, "is no part of the act, still it may assist in ascertaining the true intent and meaning of the Legislature." Edwards *v.* Pope, 4 Ill. 465.

"In modern English cases it is said that the preamble may be used to ascertain and fix the subject matter to which the enacting part is to be applied. Salkeld *v.* Johnston, 1 Hare, 196; Emanuel *v.* Constable, 3 Russel, 436; Foster *v.* Banbury, 3 Sim. 40; Crespigny *v.* Wittenoom, 4 T. R. 790. So the purview or body of the act may even be restrained by the preamble, when no inconsistency or contradiction results. Seidenbender *v.* Charles, 4 S. and R. 166; Kent *v.* Somervell, 7 Gill and J. 265. But it is well settled that where the intention of the legislature is clearly expressed in the purview, the preamble shall not restrain

§ 623. Sometimes, in enacting a statute, the legislature declares that all former statutes on the same subject are to be abrogated and repealed, and sometimes certain prior statutes are repealed by name. If so, such statutes are to be regarded as swept away absolutely from the statute book. Whether, when there is no such provision, a prior statute on the same subject is repealed by a subsequent statute, depends upon the terms of the subsequent statute. If it covers the entire ground of the prior statute, then it must be regarded as absorbing such statutes; but if the two statutes are not thus coextensive, then the second repeals the first only so far as concerns provisions as to which the second cannot be carried into effect without setting aside the first. Hence the mere imposition of a penalty on a pre-existing offence by a new statute does not exclude action for the old penalty when the two proceedings are not inconsistent. Thus the establishing a health office, by which summary remedies are given for the suppression of nuisances, does not exclude an indictment for nuisance at common law.[1] So the giving a new civil remedy, *e. g.*, injunction in a jurisdiction in which that remedy did not previously exist, does not preclude the use of other remedies previously in force.[2] One statute, however, will not be held to

Repeal of prior statutes may be implied as well as expressed.

it, although it be of much narrower import. King *v.* Marks, 3 East, 165; Kinaston *v.* Clarke, 2 Atk. 205; Holbrook *v.* Holbrook, 1 Pick. 251; Copeman *v.* Gallant, 1 P. Wm. R. 320; King *v.* Athos, 8 Mod. 144; Kent *v.* Somervell, 7 Gill and J. 265; Lees *v.* Sumersgill, 17 Ves. 510. If the words of this section, says Lord Campbell, C. J., in a recent case 'admitted of any reasonable doubt, we would look to the title and preamble, and endeavor to construe the enactments consistently with them.' Wilmot *v.* Rose, 3 Ellis & Blackburn, Q. B. 563; Free *v.* Burgoyne, 5 B. & C. 400. So, if a clear and definite remedy is given by the act, the preamble cannot be used to introduce one more extensive. Wilson *v.* Knubley, 7 East, 128; Bac. Abr. Stat., 1; Adams *v.* Wood, 2 Cranch, 335."—Sedgwick, Stat. Law, 43–4.

[1] *Supra*, §§ 616–17.

[2] Ibid. As illustrating repeals by implication, see U. S. *v.* Claflin, 97 U. S. 546; U. S. *v.* Tynen, 11 Wall. 88; Union Iron Co. *v.* Pierce, 4 Biss. 327; Com. *v.* Kelliher, 12 Allen, 480; State *v.* Jersey City, 40 N. J. L. 257; Willing *v.* Bozman, 52 Md. 44; Longlois *v.* Longlois, 48 Ind. 60; Oleson *v.* Green Bay R. R., 36 Wis. 383. That an implied repeal must be clearly shown, see Parker *v.* Hubbard, 64 Ala. 203; Andrews *v.* People, 75 Ill. 605; Walker *v.* State, 7 Tex. Ap. 245. That

repeal another by implication when the two can be reconciled so as to afford a common scheme. But whatever portion of a prior statute is manifestly inconsistent with a subsequent statute must be regarded as repealed.[1]

Statutes may become obsolete.

§ 624. We have already seen that statutes may become obsolete either in whole or in part, and that this is eminently the case with the British statutes adopted by the colonists of this country.[2] Cases, also, have occurred in which statutes adopted by state legislatures have been held to have become obsolete by non-user.[3] But the period which has elapsed in this country since the adoption of the Federal constitution has not been sufficiently extended to enable statutes to drop in this way.

Codes or statutes may absorb prior statutes or common law.

§ 625. Where a code, or a compilation of statutes purporting to embrace the whole applicatory law, is adopted, the inference is that the common law on the topic is absorbed, and has no longer any independent force. It is otherwise, as we have seen, where isolated statutes are passed which give a better remedy, or apply a severer penalty than under similar circumstances would be given or applied at common law. In such case, not only is the operation of the statute limited to its own particular object, but in respect to such object, the

the question of repeal is judicial, not legislative, see U. S *v.* Chaflin, 97 U. S. 546; Strauss *v.* Heiss, 48 Md. 292; Chesapeake R. R. *v.* Hoard, 10 W. Va. 270.

[1] Wilberforce on Stat. Law, 329 *et seq.*; Henderson's Tobacco, 11 Wall. 652; Rounds *v.* Waymart, 81 Penn. St. 395; Kilgore *v.* Com., 94 Penn. St. 495; Com. *v.* Erie R. R., 98 Penn. St. 127; Public School *v.* Trenton, 30 N. J. Eq. 667; Whitaker *v.* Haynes, 49 Cal. 596; Walker *v.* State, 7 Tex. Ap. 245; Iverson *v.* State, 34 Ala. 170; Fowler *v.* Pirkins, 77 Ill. 271; Covington *v.* St. Louis, 78 Ill. 548.

"It cannot be contended that a subsequent act of parliament will not control the provisions of a prior statute, if it were intended to have that operation; but there are several cases in the books to show, that where the intention of the legislature was apparent that the subsequent act should not have such an operation, then, even though the words of such statute taken strictly and grammatically would repeal the former act, the courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction. Williams *v.* Pritchard, 4 D. & E. 2 cited Sedgwick on Stat., 103.

[2] *Supra*, §§ 22 *et seq.*

[3] James *v.* Com., 12 S. & R. 22 Watson *v.* Blaylock, 2 Mill, Const., 35 O'Hanlon *v.* Myers, 10 Rich. 128.

[4] *Supra*, §§ 616-7, 623.

remedy or penalty it prescribes may be, if such is not forbidden by the general terms of the statute, cumulative with that at common law. There may, however, be cases in which the intention appears to have been to abrogate the whole common law bearing on a particular range of cases; and if so, that intention must be carried out, although the statutes in question do not purport to form a code.[1] Thus the decisions of the English courts limiting the range of the common law offence of malicious mischief, may be explained on the ground that as parliament had passed a series of statutes designating certain offences as malicious mischief, it was to be inferred that the enumeration was exhaustive, and that malicious mischief as a common law offence had ceased to exist.[2] Where, also, a statute purports to cover as such the whole of the common law on a particular topic, then it absorbs the common law *pro tanto;* and when it covers the whole ground of a prior statute, being coextensive therewith, then it repeals such statute.[3] But to effect such repeal or absorption either the intention to effect it must be expressed (as where a code purports to be a digest or compilation of prior statutes), or the later statute must logically conflict with the former.[4]

[1] Broaddus *v.* Broaddus, 10 Bush, 299.

[2] Whart. Crim. Law, 8th ed., §§ 1066 *et seq.*

[3] Henderson's Tobacco, 11 Wall. 652; Pingree *v.* Snell, 42 Me. 53; Isham *v.* Iron Co., 19 Vt. 230; Ellis *v.* Paige, 1 Pick. 45; Com. *v.* Cooley, 10 Pick. 37; Com. *v.* Ayer, 3 Cush. 150; Com. *v.* Dennis, 105 Mass. 162; Com. *v.* Evans, 13S.&R.426; see Industrial School Dist. *v.* Whitehead, 2 Beasley, 290. That a revision, either in part or in whole, repeals prior legislation, either entire or *pro tanto*, see Wakefield *v.* Phelps, 37 N. H. 295; Giddings *v.* Cox, 31 Vt. 607; State *v.* Conklin, 19 Cal. 501. That what is omitted in a statute or code purporting to be an entire revision is repealed, see Pingree *v.* Snell, 42 Me. 53. That the omission of a statute in a code is a repeal, see Carmichael *v.* Hays, 66 Ala. 543; Gurnee *v.* Superior Court, 58 Cal. 88. That the codification of a statute retains the old construction, see Sedg. Stat. Laws, 365, and cases there cited.

[4] R. *v.* Salisbury, 8 A. & E. 716; Dakins *v.* Seaman, 9 M. & W. 777; Morris *v.* Canal Co., 4 W. & S. 461; Chesapeake Canal *v.* Balt. R. R., 4 Gill. & J. 1; George *v.* Skeates, 19 Ala. 738.

In U. S. *v.* Sixty-five Terra Cotta Vases, 18 Fed. Rep. 508, we have the following from Wallace, J.:—

"The revised statutes must be considered as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873, and it is only when

§ 626. A statute, however, though it may cover the same ground as a prior statute, or as a distinct portion of the

the language employed in the revision is doubtful that resort can be had to the pre-existing laws to ascertain its meaning. U. S. *v.* Bowen, 100 U. S. 508; Vietor *v.* Arthur, 104 U. S. 498. It cannot be had to see if congress erred in the revision. Arthur *v.* Dodge, 101 U. S. 34, 36. Applying the accepted canons of interpretation which require every part of an act to be taken into view for the purpose of discovering the legislative intent, and which restrict general expressions whenever necessary to make all the parts harmonize and give an intelligible effect to each, it seems quite clear that the section in question does not exempt all collections of antiquities from the payment of duty. In dealing with the whole free-list, the section exempts many articles from duty unconditionally, and others conditionally. If the description of the articles specified is such as to distinguish them each from the other, there is no difficulty in determining to which the conditions apply, and to which they do not. If there had been in the section only the single description of antiquities under the classification of 'cabinets of coin, medals, and all other collections of antiquities,' it might be forcibly urged that only such collections are exempt as are assimilated to coins and medals in their general characteristics. Nearly fifty years ago it was stated by Mr. Justice Story (Adams *v.* Bancroft, 3 Sumn. 384, 386), that 'one of the best-settled rules of interpretation of laws of this sort is that the articles grouped together are to be deemed to be of a kindred nature and of kindred materials unless there is something in the context which repels that inference. *Nocitur a sociis* is a well-founded maxim, applicable to revenue as well as to penal laws.' The rule was stated in different language in Butterfield *v.* Arthur, 16 Blatchf. 216, as follows:—

"'When a general descriptive term is employed in a statute in connection with words of particular description, the meaning of the general term is to be ascertained by a reference to the words of particular description.'

"This rule of construction has been judicially declared so frequently and so consistently, that it is as much incorporated into a revenue law as though it were expressly embodied in it. But when, following this particular description, the same section subsequently describes collections of antiquities comprehensively, and declares that they are to be exempt conditionally, the distinction in the contemplation of congress, between collections generally and collections of a particular class, seems clearly defined. It is only upon this assumption that any meaning can be given to the later clause, and that effect can be given to all parts of the section. No collections of antiquity could be exempt when 'imported specially and not for sale,' if all collections, under all circumstances, were already exempt. Upon any other construction it would appear that congress, after exempting all antiquities, had proceeded in the same section of a law to revoke what it had already declared, by exempting them only upon specified conditions. The limitation or exception is in the nature of a proviso, concerning which it is affirmed that when it is repugnant to the main body of the act, the proviso shall stand and be held a repeal of the purview, as it speaks the last intention of the makers.—Sedg. St. Law, 62."

common law, does not necessarily repeal such prior statute or absorb such portion of the common law. It may be that the structure of the statute and the conditions under which it was passed may show that its object was merely to give a cumulative remedy. Of cases of this class we have numerous illustrations in statutes passed giving specific remedies for nuisance; which statutes, as has been already noticed,[1] have been held not to repeal prior statutes or to absorb the common law bearing on the same topic.[2]

Statutes may be cumulative

§ 627. It has been held that at common law the repeal of a repealing statute revives the original statute which the intermediate statute repealed.[3] There can be no question that the repeal of a statute that operated to modify or extinguish certain portions of the common law leaves the common law as it was before the adoption of the repealed statute. There seems, also, no reason why, when a section of a code is repealed, and then the repealing statute is repealed, the code in its pristine force is not to be regarded as restored. The question which arises when an insulated statute is repealed, and then the repealing statute is repealed, is one mainly of construction. It may be that, taking the whole legislation into consideration, it will appear that the first statute was repealed because it was an anachronism, or was in conflict with popular temper and policy, as was the case in England with the old statutes imposing heavy penalties on dissenters and papists; and it may be that the repealing statutes were statutes imposing mitigated penalties in the same line. If so, it would be unreasonable to suppose that the repeal of the repealing statutes revived the original statutes. On the other hand, when a statute altering a common law punishment of a particular class of common law crimes is repealed by a statute giving a lesser punishment, it would be equally unreasonable to hold that

At common law, repeal of repealing statute revives original statute.

[1] See *supra*, §§ 617, 623.

[2] See discussion in Whart. Crim. Law, 8th ed., § 26.

[3] Com. *v.* Churchill, 2 Metc. 118; Hastings *v.* Aiken, 1 Gray, 163; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667; Wilson *v.* Herbert, 41 N. J. L. 454; see Van Riper *v.* Parsons, 40 N. J. L. 123; People *v.* Wintermute, 1 Dak.Ter. 63.

the repeal of the latter statute left the offence in question without any punishment assigned to it by law. This is not what the legislature could have intended, and the inference in such case may be that the effect of the repeal is simply to do away with the modified penalty of the intermediate statute, and to restore the penalty of the original statute.[1] In England the knot in such cases is cut by 13 & 14 Vict., c. 21, which provides that where any act repealing in whole or in part any former statute is itself repealed, such last repeal shall not revive the act or provisions before repealed, unless words be added for that purpose; and that where any act shall be made repealing in whole or in part any former act, and substituting provisions instead of those repealed, such repealed provisions shall remain in force till those substituted shall come into operation by force of the last-made statute.[2] But it may be doubted whether the first clause of this statute is not likely to produce frequent failures of justice, and whether such failures can be prevented in any way other than by making the question of revival of repealed statutes one of construction.[3]

When clauses conflict the last is operative.

§ 628. When the clauses of a statute conflict, then the last controls and overrides that which precedes it, so far as there is a conflict.[4] But a clause in which a matter is treated in detail will prevail, irrespective of order, over a clause in which it is only incidentally referred to.[5] And when it is plain that the location of the clauses of a section are not based on the principle that the last

[1] See Wade *v.* Industrial School, 43 Md. 178; People *v.* Wintermute, 1 Dak. Ter. 63.

[2] Similar statutes have been adopted in several jurisdictions in the United States. See 1 Kent's Com., 466.

[3] That, where a repealing statute is limited as to time of operation, the expiration of this time revives the statute that is repealed, see Collins *v.* Smith, 6 Whart. 294. See Barry's Petition, 12 R. I. 51. As to distinctive law in New Jersey, see Wilson *v.* Herbert, 41 N. J. L. 454. That the repeal of a declaratory statute revives the common law, see Gray *v.* Obear, 5 Ga. 231; *contra*, State *v.* Slaughter, 7 Mo. 484; *Cf.* Lamb *v.* Schottler, 54 Cal. 319.

[4] Brown *v.* Clegg, 16 Q. B. 681; Gibbons *v.* Brittenum, 56 Miss. 232; Ryan *v.* State, 5 Neb. 276; Albertson *v.* State, 9 Neb. 429.

[5] State *v.* Trenton, 38 N. J. L. 64; Long *v.* Culp, 14 Kan. 412; Kansas P. R. *v.* Wyandotte, 16 Kan. 587.

clause is the summary of the section, or occupies a revisory relation to the section, then the logical meaning of the whole section is to be sought for irrespective of any inference drawn from mere location.[1]

Division in sections has no logical effect.

§ 629. The division of a statute in sections has no necessary logical effect, even where there is a statute providing that every distinct topic in a statute is to be in a distinct section. In old times, in England, there were no sections in the statutes. Subsequently the practice of dividing into sections was introduced by editors of statutes, and then by draughtsmen, but the object was simply to prevent a statute from becoming so unwieldy as to obscure to the eye its component parts. If the sections are independent, and may be regarded as following each other in order of time, then the last section prevails, as does the last clause, over those which precede.[2] But unless this be the case, they are all to be construed together.[3] When the division in sections is a distinctive part of the statute, then a section can be repealed without affecting the rest of the statute; and, in some jurisdictions, a particular section of a bill may be vetoed without affecting the rest of the bill.[4]

Statutes depend on judiciary for recognition, for comprehension, for application.

§ 630. Statutes, to sum up the positions taken in the preceding pages, are dependent on the judiciary, as follows:—

I. *For recognition.*—This involves two questions: (1) As to whether the statute was duly passed;[5] (2) as to whether, assuming it to have been duly passed, it is constitutional in whole or in part.[6]

II. *For comprehension.*—This, also, involves two questions: (1) Interpretation of particular words; (2) construction of the entire statute.[7]

[1] Ebbs *v.* Boulnois, L. R., 10 Ch. Ap. 479.

[2] *Supra*, § 628.

[3] R. *v.* Threlkeld, 4 B. & Ad. 229; Sedgwick on Stat., 96. That a subsequent section repeals a prior, see Gibbons *v.* Brittenum, 56 Miss. 232; Albertson *v.* State, 9 Neb. 429.

[4] Blake *v.* Brackett, 47 Me. 28; State *v.* Morrow, 26 Mo. 131; State *v.* Ingersoll, 17 Wis. 631.

[5] *Supra*, § 603.

[6] *Supra*, §§ 606–7.

[7] *Supra*, § 604.

Mr. Wilberforce, in the first chapter of his book on statute law, treats this topic in detail. He begins by quoting Bacon's statement in his proposal for

III. *For application to the concrete case.*—This can only be effected by the judiciary.[1] Laws as issued by the legislature are asymptotes which, until applied by either executive or judiciary, cannot touch real life so as to compel obedience. And under a constitutional government, in which the functions of executive and judiciary are duly separated, the ultimate power of application and enforcement is with the judiciary. The executive may order the execution of a law. But the power of revising this order, and releasing parties arrested in pursuance of it, remains, unless in a state of war, with the courts.

amending the laws of England (Bacon's Works, Montagu's ed., v. p. 346): "There are more doubts that rise upon our statutes, which are text law, than upon the common law, which is no text law." "The experience of nearly three centuries," Mr. Wilberforce proceeds to say, "has fully justified this saying, and shows the prophetic insight of its author;" citing *dicta* to the same effect in R. *v.* Skeen, Bell's C. C. 134, and O'Flaherty *v.* McDowell, 6 H. L. C. 179, and other cases. The following is quoted from Bramwell, L. J.: "People who draw acts of parliament are very commonly found fault with by those who never drew up an act themselves. I suppose it is impossible to foresee all the difficulties that will arise, and to use exactly precise words —to say nothing of the difficulties under which acts are drawn up." R. *v.* Monck, L. R. 2 Q. B. D. p. 552. "It seldom happens," says Cleesby, B., "that the framer of an act of parliament has in contemplation all the cases which are likely to arise, and the language, therefore, seldom fits every possible case." Scott *v.* Legg, L. R. 2 Ex. D. 42. Mr. Wilberforce (p. 4) on this point quotes Lord Campbell's reference to "an ill-framed enactment, like too many others, putting judges in the embarrassing situation of being bound to make sense out of nonsense, and to reconcile what is irreconcilable." Fell *v.* Burchett, 7 E. & B. 539. Judge Story is also cited as commenting on the same almost universal obscurity of statutes, which "arises sometimes from loose and inaccurate habits of the draughtsman; sometimes from hasty and unrevised legislation; but more frequently from abundant and perhaps ill-advised caution." Bassett *v.* U. S., 2 Story, R. 389.

Aside from the inherent difficulty in the finding, even by the most skilful and experienced of draughtsmen, of adequate words in framing a statute, it must be remembered that few bills pass the legislature as they come from the draughtsman's hands. Some ill-considered change is made in committee or on the floor of the house, by which the symmetry of the whole statute is deranged. A blunder of this kind in a judicial opinion is readily corrected. But in a statute it cannot be corrected except by new legislation, which is not only dilatory, but is exposed to the same casualties as the legislation it attempts to cure. This is not a serious objection to legislation considered as tentative and progressive. But it imposes obstacles almost insuperable in the way of fixity of codification. *Supra*, § 114.

[1] *Supra*, §§ 30, 114.

INDEX.

[THE FIGURES REFER TO SECTIONS.]

ABATING NUISANCE, right of, 5.
ABOLITION OF SLAVERY, declaratory of public sentiment, 584.
ACCESSION, territory may be acquired by, 151.
ADAMS, JOHN, theory of "evolution" of liberty, 19.
ADMINISTRATORS, applicatory law as to, 338.
ADMIRALTY JURISDICTION, nature of, 523.
ADMIRALTY LAW is the law of the sea, 36.
its limits under Federal constitution, 523.
ADOPTION, by what law effected, 291.
ADVICE, does not constitute a law, 2.
of senate, meaning of, 311, 596, 613.
AFRICAN RACE, provisions as to naturalization of, 435.
suffrage granted to, 592.
AFRICAN SLAVE-TRADE, internationally prohibited, 181, 280, 452.
ALIEN RESIDENTS, subject to local law, 178.
ALIENS, entitled to equal civil rights with citizens, 436.
international rights of, 261.
position of, under constitution of the United States, 431.
ALLEGIANCE, no longer held to be perpetual, 177.
limitations of, under constitution of the United States, 431.
AMBASSADORS, accredited only to sovereign, 138.
authority to negotiate treaties, 158. See ENVOYS, MINISTERS.
AMENDMENT OF CHARTER, power reserved of, 491.
AMENDMENTS TO CONSTITUTION, how to be adopted, 400.
validity of adoption of those as to reconstruction, 400.
inferences to be drawn from provisions as to, 373, 401.
AMERICA, common law of, whence derived, 64.
discovery of, effect of, on international law, 126.
AMERICAN LAW, history of, 19 *et seq.*, 108 *et seq.*
evolution of, 2, 19 *et seq.*
AMNESTY, president has power of, 507.
ANALYTICAL SCHOOL of jurisprudence, 6.
ANGLO-SAXON law, authority of, 66.
ANNEXATION, effect of, on laws of annexed country, 153–4.
territory may be acquired by, 151.

ANNEXATION—(*continued*).
tendencies to, 134.
how far working naturalization, 433.
the result of instinctive national growth, 462.
ANNEXATION OF TERRITORY, when constitutional, 380, 505.
ANTIQUITY, how far essential to customary law, 17.
APPRENTICESHIP, not affected by thirteenth amendment, 584.
ARBITRATION, a means of international settlement, 208.
ARISTOTLE, views of, as to origin of law, 44.
ARMIES, power to raise, sustains standing army and conscription, 456.
militia may be called out by general government, 457.
states subordinated in this respect to the United States, 458.
congress may make rules for regulation of army and navy, but cannot supersede civil courts, 459.
ARMS, right to bear, 557.
ARMY, direction of, belongs to president, 502.
ARREST, EXTRA-TERRITORIAL:
By treaty with foreign state, 353 *et seq.*
Under Federal constitution.
fugitives from justice to be surrendered, 541.
must be "fleeing" from justice, 542.
demand must be based on *prima facie* case of crime, 543.
arrest may be had in advance of requisition, 544.
no defence that defendant is amenable in asylum state, 545.
fugitive not privileged from any but specified charge, 546.
governor of asylum state cannot be compelled to act, 547.
ARSENALS, jurisdiction of congress over, 461.
ARTICLES OF CONFEDERATION, inadequacy of, 370 *n.*
ARTILLERY, international sales of, 226.
may be furnished by neutrals, 246.
how far contraband of war, 226.
ATLANTIC COAST WATERS, how far under territorial control, 185.
ATTAINDER, bills of, forbidden, 471.
AUSTIN, characteristics of works of, 6, 91 *et seq.*
views of, as to origin of law, 56.
AUTHORITY, how far necessary to institution of law, 63.
use of, in exposition of law, 613.

BACON, his views as to formation of law, 22, 63.
views of, to incidents of law, 86, 630.
views of, as to codification, 630.
BAIL, excessive, cannot be demanded, 580.
"BALANCE OF POWER," theory as to preservation of, 174.
BANCROFT, theory of constitution of the United States, 19
BANK, power of congress to establish, 417.
BANK CHARTERS, involve contracts by state, 481.

BANK-NOTES, constitutionality of laws respecting, 442.
BANKRUPTCY, effect of, not extra-territorial, 311.
congress has power as to bankruptcies, 439.
jurisdiction extends to cases of insolvencies, 440.
BANKS, national, how far taxable, 409.
BARBAROUS STATES, how far excepted from inviolability, 147.
consular courts in, 147, 170.
BELLIGERENCY, distinctive recognition of, 140, 141, 593.
BELLIGERENT, how far entitled to search vessels, 195 *et seq.*
property may be captured, 218, 485.
BELLIGERENT GOODS, how far liable to seizure at sea, 218.
BELLIGERENTS, commerce between, forbidden, 214.
"BELT," marine, extent of, 186.
BENTHAM, views of, as to origin of law, 56.
views as to sovereignty, 2, 6, 22, 90, 91.
merits as a reformer, 90.
BILLS, constitutional limitation as to framing and passage of, 603.
BILLS OF EXCHANGE, applicatory law as to, 324.
BLACK SEA, neutralization of, 192.
BLACKSTONE, defective views of as to precedent, 29.
views of the source of law, 52.
distinguishing features of commentaries, 80.
BLASPHEMY, how far a common law offence, 22.
BLOCKADE, must be effective, 233.
notice must be given, 234.
vessel running, may be confiscated, 235.
BLUNTSCHLI, view of international law, 119.
BOOTY, not permitted in war, 216.
BORROWING MONEY, power of congress as to, 416.
BRACTON, works of, 76.
BRIDGES, over navigable streams, when enjoined as obstructions of commerce, 420.
when charter of may be a monopoly, 488.
BRITISH CONSTITUTION, emanation of national conditions, 18.
BRITISH PARLIAMENT, power of, over contracts, 483.
BRITISH STATUTES, accepted or rejected by popular action of colonies, 23 *et seq.*
BRITTON, works of, 79.
BRUNS, Dr., his views as to origin of law, 2, *n.*
BURDEN OF PROOF, constitutionality of statutes modifying, 474.
BURKE, view of, as to law in the colonies, 64.
view of, as to origin of law, 53.
sustains doctrine of evolution, 33.
his position that laws not declaratory are inoperative, 27.
opposition to paper legislation, 28.
view of, as to political condition of the colonies, 365, *n.*

BURKE—*(continued)*.
his influence in America, 365, *n*.
BUSINESS, power of states over, 489.
effect of charter in restricting, 488.
BUSINESS FORMS, applicatory law as to, 342.
BUTLER, Bishop, his view of conscience as a law-maker, 61.

"CABINET" of president, functions of, 504.
CALHOUN, views as to Monroe doctrine, 175.
views of, as to character of constitution, 370.
view of, as to external improvements, 380, *n*.
CANNON RANGE, test of territorial waters, 186.
CANON LAW, how far binding in this country, 273.
CAROLINA, ineffectiveness of Locke's constitution for, 21.
CENTRALIZATION, international tendencies to, 134.
CESSION, effect of, on relations of parent state, 143.
a means of acquiring territory, effect of, 154.
CHARGÉ D'AFFAIRES, diplomatic character of, 169.
CHARTERS, how far conveying absolute parts:
all legislation impairing antecedent legal contracts invalid, 478.
limitation applies to contracts of all kinds executed by state, 479.
indebtedness incurred in accordance with state law will be sustained, though there be contrary decision by state court, 480.
legislation rescinding grants of private franchises or of estates may be invalid, 481.
stipulation not to tax may bind, 482.
growing doubts as to perpetuity of grants of franchises, 483.
distinction between temporary and perpetual engagements, 484.
grants to municipal corporations may be revoked, 485.
license may be withdrawn, 486.
charter no protection to a nuisance, 487.
charters and grants restrictive of freedom of business may be rescinded, 488.
state control over oppressive charters may be justified on the ground that this is a regulation of commerce, 489.
danger of resting function on the right of state to control business, 490.
when right of amendment is reserved, charter can be amended, 491.
construction of, 619.
CHECKS on legislation, value of, 28, 362.
CHECKS, RECIPROCAL, essential to government, 392.
CHIEF MAGISTRATE, deference due, 138.
CHINA, consular courts in, 147, 170.
CHINESE cannot ordinarily be naturalized, 435, 585.
not made citizens by fourteenth amendment, 585.
entitled to equal protection of law, 588.
CHINESE EMIGRATION, attitude of the United States as to, 179, 264, 455.

CHIVALRY, courts of, jurisdiction of, 38.
CHRISTIANITY establishes no secular system, 33.
CHOSES IN ACTION governed by *lex domicilii* of creditor, 306.
CHURCH cannot be established by congress, 553.
CICERO, views of, as to source of law, 45.
CIRCULAR LETTERS, laws applicatory to, 314.
CITIES, charters of, may be modified, 485.
"CITIZEN," meaning of, in clause giving Federal courts jurisdiction, 520.
may require protection of sovereign, 139.
CITIZENS OF STATES, reciprocal immunities of, 540.
CITIZENSHIP not convertible with suffrage, 437.
of state, not necessarily citizenship of the United States, 437.
CIVIL RIGHTS, not necessarily conferred by domicil, 260.
slavery and involuntary servitude prohibited in the United States, 584.
citizenship confined to white and negro races, 585.
prohibition limited to state action, and not applicatory to discrimination by persons or corporations, 586.
laws imposing penalties on marriage between the races not unconstitutional, 587.
equal protection of laws granted to all persons, 588.
basis of representation to be reduced in proportion to abridgment of right of suffrage, 589.
validity of public debt not to be questioned, and assumption of insurrection and emancipation debts prohibited, 590.
legislation in support of this and other amendments must be "appropriate," 591.
negro suffrage granted, 592.
binding effect of reconstruction amendments, 593.
these amendments limit state interference with private rights, 594.
they are more conducive to business prosperity than clause protecting contracts as construed in Dartmouth College Case, 595.
they do not disarrange but make manifest equipoise of constitution, 596.
CIVIL WAR, American, effect in aggrandizing the United States, 134, 596.
American, effect of, on doctrine of neutrality, 243.
recognition of belligerency to parties to, 141.
effects of, in unfolding meaning of constitution, 596.
CLAIMS, COURT OF, jurisdiction of, 528.
CLAUSES, effect of conflicting, 628.
CLAY, HENRY, view of, as to evolution of powers, 380.
CLOUDS ON TITLE may be constitutionally removed, 567.
COAL, when contraband of war, 226, 241.
COALING belligerent steamers, how far breach of neutrality, 251.
COAST LINE, extent of, 186 *et seq.*
CODE cannot be final, 12, 30, 114.
fixity of, incompatible with evolution, 114.
repeals prior legislation, 625.

CODE NAPOLEON, its permanence due to its vagueness, 62.
CODIFICATION of international law, difficulties of, 122.
COERCION OF STATE, in what sense constitutional, 378.
"COINING," Federal power of, 442.
COKE, value of works of, 87.
COLONIAL DIVERSITIES, how far operating in moulding Federal constitution, 363.
COLONIAL LAW, spontaneous production of, 2, 22 *et seq.*
COLONISTS, instinctive moulding of law by, 23, 111.
COLONIZATION, how far originating on common law, 64.
COLONIZATION, ENGLISH, cause of permanency of, 364.
COMMANDER-IN-CHIEF, power of president acting as, 503.
COMMERCE between belligerents forbidden, 214.
COMMERCE, FOREIGN, how far an international right, 148, 207, 421.
COMMERCE, REGULATION OF, power as to:
power meant to secure freedom of trade between states, 418.
this required by diversity of climate, of soil, of population, 419.
state cannot close interstate waters, 420.
United States has exclusive power of regulating foreign and interstate commerce, 421.
commerce may be regulated on land, 422.
exception as to matters of necessarily local law, 423.
quarantine laws are under state power. So of wharfage and pilotage laws, 424.
does not prevent states from exercising police exclusion, 425.
restriction does not touch purely interstate transactions, 426.
establishing by state of ferries and river improvements not forbidden, 427.
power authorizes laws limiting liability of ship-owners, 428.
extends to rivers and tributary to lakes, 429.
tonnage duties prohibited, 430.
COMMERCIAL DOMICIL, meaning of, 219.
COMMERCIAL PAPER, applicatory law as to, 324.
COMMON CARRIERS, applicatory law as to, 330.
COMMON LAW, incidents of, 14 *et seq.*
not essential that it should have existed time out of mind, 17.
embraces international law, 119.
modification of, by time, 22.
to be considered in construing statute, 616.
English, adopted, subject to popular modification, 22–5.
COMMUNISM cannot be established by law, 27.
COMPROMISES OF CONSTITUTION, binding effect of, 596.
CONCURRENT, when powers of state and Federal government may be, 381.
CONFEDERACIES, international characteristics of, 137.
CONFEDERATE CRUISERS, how far privateers, 201.

CONFEDERATE STATES, argument from constitution of, 370.
belligerency of, 140, 201, 593.
CONFEDERATION, how distinguished from a constitution, 370.
articles of, inadequacy of, 370, *n.*
CONFISCATION, how far permitted in war, 216, 455, 467.
CONFLICT OF FEDERAL AND STATE JURISDICTIONS, rules as to, 524, 527.
CONFLICT OF LAWS. See INTERNATIONAL LAW, PRIVATE.
CONGRESS to consist of two branches, 363. See LEGISLATURE.
CONGRESS, FUNCTIONS OF:
senate is the representative of the states, and has coördinate legislative powers, 395.
house of representatives elected by the people on state franchise, and has coördinate legislative powers; and elects its own speaker, 396.
each house determines its own elections and rules; is bound to keep a journal; requires a majority for a quorum; may punish for contempt; is limited as to adjournment; is privileged as to debate; and may expel members, 397.
president has a qualified veto, 398.
civil officers may be impeached, 399.
amendments may be made by convention or by action of congress and states, 400.
inferences to be drawn from the obstacles interposed, 401.
CONGRESS OF VIENNA, effect of settlement by, 120, 131.
CONQUEST, effect of, in planting law, 64.
territory may be acquired by, 151.
CONSCIENCE, office of, in evolution of law, 16, 60, 63.
of people, influencing formation of law, 22 *et seq.*, 59, 60.
CONSCIENCE, NATIONAL, appealed to by international law, 121.
CONSCRIPTION LAWS, constitutionality, 456.
CONSOLIDATION, INTERNATIONAL, tendencies to, 134.
CONSTITUTION, FEDERAL:
the result of existing conditions, 18, 359.
prominence assigned to these conditions in construction, 360.
the formation of a stable government necessary, 361.
and so of interposition of such checks as would prevent hasty and ill-considered changes of public policy, 362.
and so of distribution of power in local governments, 363.
this policy required by race tendency to institutionalism, 364.
government to possess only such functions as cannot be conveniently exercised by people, 365.
American institutions revolutionary, 368.
in states people are supreme arbiters, 369.
constitution not a league, 370.
was adopted by the people of the states, 371.
confirms sovereignty in the states, 372.

CONSTITUTION, FEDERAL—(*continued*).
recent amendments strengthen this view, 373.
"nation" properly applicable to the people of the United States as a body; "state" to the particular states; "sovereignty" is not necessarily absolute, 374.
"territories" not included in term "states," 375.
in the exercise of powers given to it general government is supreme, subject to restrictions of constitution, 376.
importance of preserving constitutional demarcations, 377.
coercion of state and maintenance of Federal authority not convertible, 378.
limitations in constitution apply to general government unless expressly applied to states, 379.
necessity does not abrogate constitutional limitations, but progressive conditions unfold them, 380.
powers of state and Federal governments may be coördinate, 381.
state laws followed as to state procedure, 382.
treaties and statutes come in *pari passu*, 383.
presumption as to unconstitutionality, 384.
unconstitutional part may be rejected, 385.
statutes must be constitutionally passed, 386.
See ATTAINDER; BANKRUPTCY; COMMERCE; CONGRESS; CONTRACTS, LAWS IMPAIRING; COPYRIGHTS; DISTRICT OF COLUMBIA; EX POST FACTO LAWS; FREEDOM OF SPEECH; GOVERNMENT; GUARANTY OF REPUBLICAN INSTITUTIONS; HABEAS CORPUS; JUDICIARY; MONEY; NATURALIZATION; PARTIES; PIRACIES; POSTAL SERVICE; RECONSTRUCTION AND CIVIL RIGHTS; RELIGIOUS TESTS; SEARCHES AND GENERAL WARRANTS; STATES; TAXATION; TREASON; WAR.
CONSTITUTION OF ENGLAND, evolution of, 18.
CONSTITUTIONALITY, a matter for executive and legislative, as well as judicial determination, 389.
CONSTRUCTION OF FEDERAL CONSTITUTION. See CONSTITUTION, 359 *et seq.*
CONSTRUCTION OF STATUTES, rules as to, 604 *et seq.*
CONSTRUCTION OF TREATIES, rules as to, 157.
CONSTRUCTIVE BLOCKADE, nature of, 233.
CONSULS, diplomatic powers, 170.
jurisdiction over, 170.
immunities of, 170.
CONTEMPT, how far executive can pardon, in cases of, 508.
CONTINENTAL CONGRESS, deterioration of, 361.
CONTINUED VOYAGES, relations of, to blockade, 233.
CONTRABAND.
articles contraband of war may be forfeited, 218, 226.
in cases of conspiracy ships may be confiscated, 227.

CONTRABAND—(*continued*)
question as to dispatches and diplomatic agents, 228.
such agents may communicate through belligerent lines, 229.
destination of ship imputed to goods, 230.
CONTRACTS, LAWS IMPAIRING OBLIGATION OF:
constitutional limitation prompted by political and business dangers, 477.
all legislation impairing antecedent legal contracts invalid, 478.
limitation applies to contracts of all kinds executed by state, 479.
indebtedness incurred in accordance with state law will be sustained though there be contrary decision by state court, 480.
international rules concerning. See INTERNATIONAL LAW; PRIVATE.
legislation rescinding grants of private franchises or of estates may be invalid, 481.
stipulation not to tax may bind, 482.
growing doubts as to perpetuity of grants and franchises, 483.
distinction between temporary and perpetual engagements, 484.
grants to municipal corporations may be revoked, 485.
license may be withdrawn, 486.
charter no protection to a nuisance, 487.
charters and grants restrictive of freedom of business may be rescinded, 488.
state control over oppressive charters may be justified on the ground that this is a regulation of commerce, 489.
danger of resting function on the right of state to control business, 490.
when right of amendment is reserved, charter can be amended, 491.
laws modifying remedies are not unconstitutional, 492.
but not when the obligation of the contract is impaired, 493.
statutes modifying evidence are not unconstitutional, 494.
state discharges do not bind citizens of other states, 495.
marriage not within limitation, 496.
nor is tenure of public office, 497.
CONVENTION, CONSTITUTIONAL, inadequate views of its members, 596, *n.*
COPYRIGHTS AND PATENTS:
power of granting is exclusively in congress, 450.
"CORNERING," inoperativeness of statutes as to, 27.
CORPORATION, domicil of, how determined, 259.
CORPORATIONS protected by fourteenth amendment, 588, 594.
also by clause prohibiting impairing of contracts, 481. See FRANCHISES.
COTTON, how far contraband of war, 217.
COUNTERFEITING, how far Federal courts have exclusive jurisdiction of, 524.
COUNTRY, effect of, on modifying law, 22.
COURT OF CLAIMS, jurisdiction of, 528.

COURTS:
legislative, judicial, and executive functions to be kept separate, 388.
judiciary cannot supervise matters purely political, 389, 522.
dangerous consequences of judicial assumption of such functions, 390.
courts cannot compel executive to testify or exact disclosure of political secrets, 391.
courts cannot annul laws because unjust, 392.
inconsiderate legislation prevented by reciprocal checks, 393.
supreme court not thereby made absolute, 394.
judicial power of the United States extends to cases under the United States constitution, laws, and treaties; to cases of admiralty and maritime jurisdiction; and cases in which the United States or states are parties, 516.
judicial powers are in the main apportioned by congress, 517.
supreme court has no general or final jurisdiction, 518.
supreme court has final jurisdiction in all conflicts with state courts as to Federal constitution and laws, 519.
"citizen" in the clause giving Federal courts jurisdiction means "resident," 520.
by statute cases may be removed from state to Federal court, 521.
political questions not of judicial cognizance, 522.
admiralty and maritime jurisdiction to be distinguished, 523.
Federal courts have no common law jurisdiction of crimes, but statutory jurisdiction is exclusive, 524.
territorial courts may be constituted by congress, 525.
Federal courts adopt state rules and practice as to state questions, 526.
in questions of concurrent jurisdiction, tribunal that first takes control retains it, 537.
United States may be sued in court of claims, 528.
controversies between states include questions of boundary, 530.
states must be the real parties to sue, 531.
states can no longer be sued by individuals in Federal courts, 532.
power of, in making law, 29.
no case bound by exact precedent, 29.
necessary logical evolution by courts, 30.
this not necessarily arbitrary, 31.
Nor is such law *ex post facto*, 32.
responsibility of and restraint on, 394.
may determine statute to be unconstitutional, 393.
cannot control executive or legislature, 388 *et seq.*
COURTS MARTIAL, power of, 37, 579.
CREDIT, letter of, laws applicatory to, 315, 334.
CRIMES, Federal courts have no common law jurisdiction of, 524.
how far statutory jurisdiction is exclusive, 524.
international rules as to, 350 *et seq.* See COURTS; JUDICIARY, PIRACY; HABEAS CORPUS; EXTRADITION; FORGERY.

CRIMES AND MISDEMEANORS, meaning of clause as to impeachment, 399.
CRIMINAL PROSECUTIONS, object of, 4.
CRUISERS, relation of belligerent, to neutrals, 238–9.
how far entitled to search merchant ships, 194.
sale of, how far a breach of neutrality, 249–250.
CUBA, proposed guarantees of, 174.
CURATIVE STATUTES, not unconstitutional, 567.
CURRENCY, cannot be regulated by law, 27.
congress may coin money and regulate its value, 442.
states cannot issue bills of credit, 443.
congress may punish counterfeiting, 444.
CUSTOM, the first stage in the formation of law, 14.
custom makes law, not law custom, 15.
common law the product of right reason based on national conscience and need, 16.
effect of in repealing statutes, 22.
may be the basis of international law, 122.
CUSTOMARY LAWS, nature of, 14.

DANUBE, free navigation of, 191.
DARDANELLES, how far open to navigation, 185.
DARTMOUTH COLLEGE CASE, criticism of, 483, 595.
DE DONIS, statute of, action of judges on, 22.
DE FACTO GOVERNMENT, authoritativeness of, 145.
DEBATES, not admissible to explain statute, 611.
DEBTS, governed by *lex domicilii* of creditor, 306.
DECLARATION OF WAR, how far necessary, 211.
rule in United States, 454.
DECLARATORY, necessary that laws should be, 27.
DECLARATORY LEGISLATION, cannot annul prior contracts, 479, 526.
DECLARATORY STATUTES, incidents of, 600.
DEFENCE OF SELF, cannot be divested by law, 27.
DEFINITION OF LAW, 1 *et seq.* See LAW.
DEMOCRACY, its relations to law, 28.
DEPARTMENTS OF GOVERNMENT:
legislative, judicial, and executive functions to be kept separate, 388.
judiciary cannot supervise matters purely political, 389.
dangerous consequences of judicial assumption of such functions, 390.
courts cannot compel executive to testify or exact disclosure of political secrets, 391.
courts cannot annul laws because unjust, 392.
inconsiderate legislation prevented by reciprocal checks, 393.
DESCENT, governed as to personalty by *lex domicilii*, 306.
DESPATCHES, BELLIGERENT, how far contraband, 228.
DIALOGUE DE SCACCARIO, authority of, 74.

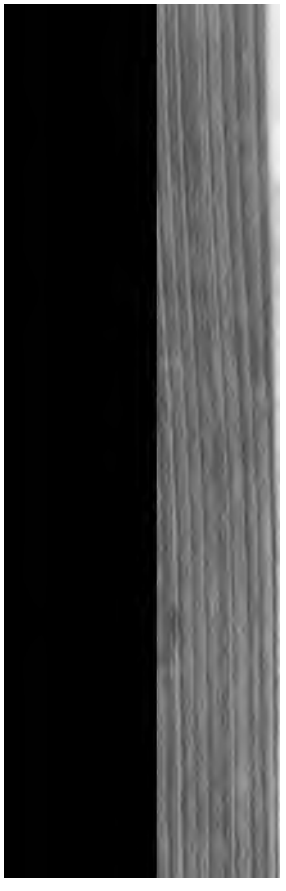
DIPLOMATIC AND CONSULAR AGENTS:
diplomacy a system of law, 163.
ministers sent from government to government, 164.
belligerents may be represented, 165.
sending and reception a matter of discretion, 166.
inviolability and extra-territoriality of embassies, 167.
privilege extends to journey, 168.
classification, 169.
consuls not so privileged, 170.
may have jurisdiction in foreign lands, 171.
exequatur required, 172.
"DIRECT TAX," meaning of term, 407.
DIRECTORY STATUTES, incidents of, 600.
DISCHARGES IN INSOLVENCY, effect of, 439.
DISCOVERY, how far planting a law, 64.
DISFRANCHISEMENTS, when unconstitutional as *ex post facto*, 472.
DISTRIBUTION OF PERSONALTY, determined by *lex rei sitae*, 306.
DISTRICT OF COLUMBIA, CEDED PLACES AND TERRITORIES:
in district and ceded places congress has exclusive jurisdiction, 461.
congress holds territories in trust, 462.
title to land of territories is in the United States, 463.
government to be under general safeguards of constitution, 464.
form of government at discretion of congress, 465.
DIVISIBLE, when statute is construed to be in reference to constitutionality, 385.
DIVISION OF STATE, effect of, on public debt, 142.
DIVORCE: INTERNATIONAL RULES AS TO:
foreign divorces viewed with disfavor, 278.
domicil of petitioner essential to give jurisdiction, 279.
mere residence not sufficient, 280.
judicial separation gives wife independent domicil, but not mere voluntary separation, 281.
place of marriage and of offence immaterial, 282.
extra-territorial service may be adequate, and so of service by publication, 283.
record must aver necessary facts, and may be disputed, 284.
DIX, GENERAL, view of, as to Monroe doctrine, 175.
DOCKYARDS, jurisdiction of congress over, 461.
DOCTRINAIRE VIEWS, not consistent with American traditions, 362, 596.
DOMICIL:
is a residence acquired as a final abode, 180, 254.
determines personal *status*, 255.
legitimate children take father's domicil and nationality; illegitimate, that of mother, 256.
wife takes domicil of husband, 257.
student's domicil is his home, 258.
domicil of corporation is its principal place of business, 259.

DOMICIL—(*continued*).
domicil is basis of taxation, but not of political rights, 260.
DOMICIL, COMMERCIAL, meaning of, 219.
"DUE PROCESS OF LAW:"
meaning of term, 566.
provision as to, applies to Federal government, 566.
and to state governments, 588.
"due process of law," means law which is constitutional and consistent with common law rights, 566.
private statutes quieting title not unconstitutional, 567.
defects of formal incapacity may be cured, 568.
private property cannot be taken without compensation, 569.
rule applies to real estate, 570.
property must be vested, 571.
sovereign has right of eminent domain, 572.
United States government may exercise the right for Federal purposes, 573.
must be for public use, 574.
franchise may be thus taken, 575.
exercise of right must be by general law, except in cases of necessity, 576.
power may be delegated, 577.
compensation must be fairly adjusted, 578.
defendant entitled to an impartial jury of place of crime, to be informed of the nature of the charge; to have compulsory process for witnesses and have counsel, 579.
excessive bail and "cruel and unusual punishment" forbidden, 580.
jury trial secured in United States courts, 581.
DUKE OF YORK'S LAWS, operation of, 23, *n*.
DUTCH, influence of, in forming colonial laws, 23, 25, *n*, 64.
DUTCH LAW, how far in force in New York, 64.
DUTIES, PROTECTIVE, how far constitutional, 411–13, 416.

EAST RIVER, bridge over, sustained, 420.
EGYPT, consular courts in, 147, 170.
ELECTIONS:
in American policy, not to take immediate effect, 362.
power of congress over, 468.
ELECTIONS FOR HOUSE OF REPRESENTATIVES, power of congress to supervise, 396.
ELECTORAL COMMISSION, constitutionality of law concerning, 388.
ELEVATORS, power of state over, 490.
EMBARGO:
may be sustained by international law, 207.
constitutionality of, 148, 414.
EMBASSADORS, belligerent; how far contraband, 228–9.
EMBASSIES, characteristics of, 163. See AMBASSADORS.

ENGLISH HISTORY, influence of, on American Inst
ENGLISH LAW:
history of, 65 *et seq.*
accepted or rejected by popular action of colonies, 2
ENGLISH LAW REFORMS, evolution of, 107.
ENLARGING STATUTES, incidents of, 599.
ENLISTMENTS, foreign, not permissible, 247, 249.
ENUMERATED POWERS; how to be exercised, 4
ENVIRONMENTS, value of, in construing constitutic
612.
ENVOYS, diplomatic character of, 169.
belligerent; how far contraband, 228–9.
EQUAL PROTECTION OF LAWS granted to a
CIVIL RIGHTS.
EQUALITY OF STATES essential to international l
EQUIPOISES OF CONSTITUTION not disturbed b
596.
EQUITY, prevalence of, 35.
ETHICAL SCHOOL of jurisprudence, 6.
EUROPE, consolidation of power in, 134.
EVIDENCE:
applicatory law as to, 345.
retrospective modification of, is not unconstitutional
"EVOLUTION," the unconscious factor of law, 18.
British constitution emanating from national conditi
so as to constitution of the United States, 19.
unconscious change of institutions illustrated by sla
paper law giving way to instinctive and customary
law made to bend to national conditions, 22.
illustrated in Pennsylvania, 23.
illustrated in Massachusetts, Rhode Island, and Lo

EVOLUTION, JUDICIAL, a necessity of litigation, 30.
EX POST FACTO AND RETROSPECTIVE LAWS:
limitation relates to criminal prosecutions, 472.
law changing procedure not necessarily *ex post facto*, 473.
nor are laws modifying rules of evidence, 474.
under state constitutions retrospective laws are unconstitutional, 475.
EXAMPLE, an object of law, 4.
EXCESSIVE BAIL, cannot be demanded, 580.
EXECUTION, when, may be retrospectively modified, 493.
EXECUTIVE POWERS:
president commands army, navy, and militia, 502.
has no power, as commander-in-chief, to dispense with law as a system, 503.
cabinet composed of heads of departments, 504.
president, with advice and consent of senate, may make treaties, 305.
treaties are in some respects self-enforcing, but not in respect to matters requiring legislative action, 506.
president has power to reprieve and pardon, 507.
exceptions as to impeachment and contempt, 508.
pardons may be conditional, 509.
pardon before sentence remits costs and penalties, 510.
president has power of appointment and removal, 511.
has qualified legislative functions, 512.
cannot be controlled by judicial writ, 513.
EXECUTORS, applicatory law as to, 338–46.
EXEMPTION LAWS, may be constitutional, 492, 493.
EXEQUATUR, requisite for consular action, 172.
EXPATRIATION, now internationally conceded, 177.
EXPORTS, limitation as to taxation of, 408.
EXPOSITION, of constitution, dependent on history and extrinsic conditions, 359, 360, 612.
EXTRADITION, INTERNATIONAL:
extradition generally limited by treaty, 352.
refused when there cannot be a fair trial, and when the object is political, 353.
state having jurisdiction ought not to surrender, 354.
terms should be construed as in asylum state; probable cause enough; evidence for defence admissible, 355.
circuit court may review case, and executive may refuse surrender, 356.
trial should be restricted to offence specified in demand, 357.
EXTRADITION, INTERSTATE, may be granted on requisition, 541 *et seq.*
EXTRA-TERRITORIAL SERVICE of writs, validity of, 344, 539.
EXTRA-TERRITORIALITY, how far belonging to public ministers, 167.



powers of, as to *habeas corpus*, 534.
FEDERAL GOVERNMENT, supreme within its orbit,
power of, over interstate railroads, 489–490.
recognition of confederate belligerency, 141, 165, 22
FEDERAL JUDICIARY, powers of, 516 *et seq.* See
FEDERAL LAW, original meaning of term, 3.
FELONIES, on the seas, congress has jurisdiction over,
FERRIES, constitutionality of laws respecting, 427.
FIELD, D. D., code of international law, 122.
citations from, 141, 153, 167, 178, 191, 195 *b*, 228.
FINALITY, no laws can establish, 27.
FISHERIES, how far there may be exclusive right to, 1
FISHING, local regulations of, rule as to, 423.
FLAG, gives its immunities to ship, 188.
how far protecting goods, 218.
"FLEEING FROM JUSTICE," meaning of, 541–2.
FLETA, works of, 77.
FOREIGN COMMERCE, under control of congress, 41
FOREIGN LAWS, how far extra-territorial, 266.
FOREIGN SHIPS, law relating to, 188 *et seq.*
FOREIGNERS, international rights of, 261.
may be excluded when disturbing domestic peace, 14
subject to law of place of residence, 178,
FORFEITURE, when worked by treason, 467.
FORGERY, how far Federal courts have exclusive juris
FORMALITIES, applicatory law as to, 342.
FORTESCUE, treatise of, 83.
FRAMERS OF CONSTITUTION, views of, as to its
sive, 359, 360, 363, 596 *n.*, 612.
FRANCE, distinctive rule as to allegiance, 177.
FRANCHISE, ELECTORAL, determinable in the mai
FRANCHISES:
legislation rescinding grants of private franchises, o

FRANCHISES—(*continued*).
license may be withdrawn, 486.
charter no protection to a nuisance, 487.
charters and grants restrictive of freedom of business may be rescinded, 488.
state control over oppressive charters may be justified on the ground that this is a regulation of commerce, 489.
danger of resting function on the right of state to control business, 490.
when right of amendment is reserved, charter can be amended, 491.
construction of grants of, 619.
protected by fourteenth amendment, 588, 594.
FRANKLIN, Dr., his views as to colonial customary legislation, 23.
his responsiveness to popular condition, 365.
FREEDOM, CONSTITUTIONAL GUARANTEES OF, 555 *et seq.*, 561.
freedom of speech not to be abridged, 555.
slavery and involuntary servitude prohibited, 583.
equal protection of laws granted to all persons, 588.
basis of representation to be reduced in proportion to abridgment of right of suffrage, 589.
legislation in support of this and other amendments must be "appropriate," 591.
negro suffrage granted, 592.
binding effect of reconstruction amendments, 593.
these amendments limit state interference with private rights, 594.
they are more conducive to business prosperity than clause protecting contracts as construed in Dartmouth College Cases, 595.
they do not disarrange, but make manifest equipoise of constitution, 596.
FREEMAN, EDWARD, views of, as to coming and going of slavery, 20.
views of, as to relations of Federal and local governments, 363, *n.* See PREFACE.
FREE-TRADE, interstate, required by condition of country, 418–19.
FRENCH CODE, elasticity of, 62.
FRENCH INSTITUTIONS IN AMERICA, why short lived, 364.
FRENCH LAW, how far entering into English common law, 66.
FRENCH REVOLUTION, effect of, on law of nations, 130.
FUGITIVES FROM JUSTICE, extraditions of, 352 *et seq.*, 541.

GARIBALDI, international position of army of, 221.
GENEVA, award of, international effect of, 243–4.
GILBERT OF THORNTON, works of, 78.
GLADSTONE, views of, as to constitution of the United States, 19.
his views as to intervention, 174.
GLANVILLE, works of, 75.
GOODS IN TRANSIT, governed by *lex domicilii*, 306.
GOVERNMENT, requisites of, at time of framing Federal constitution:
the formation of a stable government necessary, 361.

GOVERNMENT—(*continued*).
and so of interposition of such checks as would prevent hasty and ill-considered changes of public policy, 362.
and so of distribution of power in local governments, 363.
this policy required by race tendency to institutionalism, 364.
government to possess only such functions as cannot be conveniently exercised by people, 365.
GOVERNMENT, DEPARTMENTS OF:
legislative, judicial, and executive functions to be kept separate, 388.
judiciary cannot supervise matters purely political, 389.
dangerous consequences of judicial assumption of such functions, 390.
courts cannot compel executive to testify or exact disclosure of political secrets, 391.
courts cannot annul laws because unjust, 392.
inconsiderate legislation prevented by reciprocal checks, 393.
supreme court not thereby made absolute, 394.
GOVERNMENT, FEDERAL, supreme, subject to restrictions of constitution, 376. See SOVEREIGNTY.
importance of preserving constitutional demarcations, 377.
coercion of state and maintenance of Federal authority not convertible, 378.
limitations in constitution apply to general government unless expressly applied to states, 379.
necessity does not abrogate constitutional limitations, but progressive conditions unfold them, 380.
powers of state and Federal governments may be coördinate, 381.
state laws followed as to state procedure, 382.
treaties and statutes come in *pari passu*, 383.
GOVERNMENT, LOCAL, distribution of power in, 363.
this policy required by race tendency to institutionalism, 364.
government to possess only such functions as cannot be conveniently exercised by people, 365.
GOVERNMENT, STATE See STATES.
GOVERNMENT, UNITED STATES. See CONSTITUTION, FEDERAL.
GRAND JURY, when essential, 561.
GRANTS OF FRANCHISES to be construed strictly, 619.
GREECE, views of, as to international law, 124.
GROTIUS, view of, as to origin of law, 46.
view of international law, 119.
influence of, on international law, 127.
GUARANTY OF REPUBLICAN INSTITUTIONS, effect of, 552.
does not extend to suffrage or distribution of powers, 549.
nor to social equality, 550.
nor to exemption from revolution, 551.
but may sustain reconstruction after government has been suspended, 552.
GUARANTY TREATIES, effect of, 156.

GUARDIANSHIP, by what law determined, 295.
domicil of ward determines as to his personalty; foreign guardian must act under local law, 295.
so of foreign guardian of lunatic and spendthrift, 296.
GUERILLAS, when internationally sanctioned, 221.
GUNS, how far contraband, 226.
may be furnished by neutrals, 246.

HABEAS CORPUS, by Federal judge, limited to cases involving Federal laws, 534.
state court cannot discharge on Federal commitment, but Federal court may on state commitment, 535.
power to suspend belongs to congress, 536.
HALF-SOVEREIGN STATES, characteristics of, 137.
HALL, view of international law, 123.
HARBOR LAW, how far under control of state, 423.
HEADS OF DEPARTMENTS, functions of, 504.
HEFFTER, view of international law, 119.
HINGHAM, works of, 80.
HISTORICAL SCHOOL of jurisprudence, 6.
HISTORY, influence of, in determining constitution, 360.
HISTORY OF ENGLISH AND AMERICAN LAW, 66, *et seq.*
HISTORY OF INTERNATIONAL LAW:
in primitive times no such law recognized, 124.
tendencies in the middle ages, 125.
reformation cosmopolitan, 126.
Grotius the founder of the modern system, 127.
development under Louis XI., 128.
natural law prior to the French Revolution, 129.
French Revolution hostile to rights of the states, 130.
congress of Vienna appeals to legitimacy, 131.
consequences of fall of Orleans dynasty, 132.
modifications by treaty of Paris of 1856, 133.
tendencies to absorption of minor states, 134.
HOBBES, distinctive views of, 6, 47.
HOLLAND, his definition of jurisprudence, 2, *n.*
views of, as to legal rights, 8.
distinctive views of, as to origin of law, 105.
"HOLY ALLIANCE," its views as to intervention, 174.
action of, as to law of nations, 131.
HOOKER, maintains doctrine of evolution of law, 33.
view of, as to origin of law, 47, 86.
criticism of, 86.
HOUSE OF REPRESENTATIVES, functions of, 396–7. See CONGRESS.
HURD, J. C., theory of national existence, 374, 593.

ILLEGAL CONTRACTS, applicatory law as to, 333.
IMMOVABLES, governed by *lex rei sitae*, 299.
IMPEACHMENT, nature and effect of, under constitution, 399.
IMPERATIVE STATUTES, nature of, 600.
IMPOLICY, does not avoid statute, 608.
IMPORTS, limitations as to taxations of, 408.
not taxable by state, 410.
IMPORTATIONS, states have no power over, 418 *et seq.*
IMPRESSMENT, now surrendered, 194.
IMPRISONMENT, how affected by thirteenth amendment, 584.
INCAPACITIES, foreign, how far extra-territorial, 266.
INCIDENTAL POWERS. Congress may make laws to carry into effect enumerated powers, 568.
INCOME OF UNITED STATES, growth of, since 1790, 380, *n.*
INCOME TAX, constitutional limits of, 413
INDEMNITY, may be required for injuries, 139.
when internationally awarded, 205.
INDEPENDENCE of foreign insurgents, recognition of, 140.
INDIANS, NORTH AMERICAN, distinctive law to which they are subject, 26, 265, 434, 585.
INDIAN TRIBES, when distinct nationalities, how far governed by United States laws, 26, 265, 434.
INFAMOUS CRIMES, nature of, under constitution, 561.
INJUSTICE, no ground by itself for courts to reject statute, 392.
does not avoid statute, 608.
INLAND LAKES, under power of congress, 429.
INLAND SEAS, relations of, 192.
INSOLVENCY, power of congress as to, 439–40.
INSTITUTIONALISM, tendency to, effect of on English colonies in America, 364.
INSURANCE, applicatory law as to, 327.
INSURGENTS, international relations of, 217.
property of, may be confiscated, 455.
how far property of, can be confiscated, 217, 455, 467.
INSURRECTION, effect of, when successful on debt of parent state, 142.
INSURRECTION DEBTS, assumption of, prohibited by constitution, 590.
INTENTION, how far to guide construction, 616.
of framers of constitution, not conclusive as to meaning, 359, 360, 363, 612.
INTERFERENCE, INTERNATIONAL, when permissible, 174.
INTERMARRIAGE BETWEEN RACES, may be prohibited, 587.
INTERNAL IMPROVEMENTS, question of, political, not judicial, 447.
INTERNATIONAL LAW: PRIVATE.
General Rules.
private international law part of the common law, 252.
penal laws not extra-territorial, 253.

INTERNATIONAL LAW: PRIVATE—(*continued*).

Domicil.

domicil is a residence acquired as a final abode, 254.

determines personal *status*, 255.

legitimate children take father's domicil and nationality; illegitimate that of mother, 256.

wife takes domicil of husband, 257.

student's domicil is his home, 258.

domicil of corporation is its principal place of business, 259.

domicil is basis of taxation, but not of political rights, 260.

Personal Status.

aliens entitled to rights of citizens, 261.

naturalization now internationally conceded, 262.

persons of African descent entitled to equal rights, 263.

otherwise as to Chinese, 264.

Indian tribes not so entitled, but form distinct nationalities, 265.

foreign disabilities not extra-territorial, 266.

liberty of action subordinate to national policy and good morals, 267.

foreign attainder and infamy not extra-territorially effective, 268.

Marriage.

not a contract, but an institution, 271.

parental custody and power determined by local law, 292.

Guardianship.

domicil of ward determines as to his personalty; foreign guardian must act under local law, 295.

so of foreign guardian of lunatic and spendthrift, 296.

Law of Things.

lex rei sitae determines whether a thing is property, 298.

Immovables.

immovables governed by the *lex rei sitae*, 298.

chancellor may compel to convey foreign land, 300.

forms of conveyance determined by *lex rei sitae*, 301.

Movables.

better opinion now is that movables are governed by *lex rei sitae*, 304.

rule applies to liens, 305.

exception in respect to succession, marriage, and goods *in transitu*, 306.

title must be made in conformity with *lex rei sitae*, 307.

ships at sea governed by law of flag, 308.

debts subject to law of creditor's domicil, 309.

prescription, limitation, and escheat are governed by *lex rei sitae*, 310.

bankrupt assignments have no extra-territorial effect, 311.

Contracts—General Rules.

contracts may be subject to as many jurisdictions as there are parties, 314.

question as to seat of contract may be contested by several jurisprudences, 315.

lex loci contractus determines interpretation, 316.

INTERNATIONAL LAW: PRIVATE—(*continued*).
in this country, impediments reduced to consanguinity by descent and laterally in one degree, 272.
laws requiring consent of parents or of state or church not extra-territorial, 273.
divorced parties may be bound not to remarry, 274.
law of place of celebration determines mode of celebration, except when subjects of other states are excepted, or the local rites violate conscience or are barbarous, 275.
Divorce.
foreign divorces viewed with disfavor, 278.
domicil of petitioner essential to give jurisdiction, 279.
mere residence not sufficient, 280.
judicial separation gives wife independent domicil, bnt not mere voluntary separation, 281.
place of marriage and of offence immaterial, 282.
extra-territorial service may be adequate, and so of service by publication, 283.
record must aver necessary facts, and may be disputed, 284.
Parental Relations.
legitimation by subsequent marriage determined by laws of domicil of parent and child, 288.
as to real estate, territorial policy prevails, 289.
so as to legitimation generally, 290.
so as to adoption, 291.
place of acceptance is place of contract, 317.
lex loci actus determines mode of solemnization, 318.
law of place of performance determines mode of performance, 319.
dates not conclusive as to place, 320.
when laws conflict, that most favorable preferred, 321.
lex fori, when peremptory, to be obeyed, 322.
Maritime Contracts.
contract as to ship determined by law of flag, 323.
Commercial Paper.
each party bound by his own law, 324.
law of place of payment controls payment, 325.
process determined by *lex fori*, 326.
Insurance.
law relating to payment is that of place of payment, 327.
interpretation depends on usage, 328.
Partnership.
secret partners may set up limitations of domicil, but not open partners, 329.
Common Carriers.
law of place of performance determines mode of performance; law of place of payment determines payment, 330.

INTERNATIONAL LAW: PRIVATE—(*continued*).

Illegal Contracts.

illegality determined by law of place of performance, unless *judex fori* is precluded from entertaining suit, 331.

contracts conflicting with laws of nations or with public policy will not be enforced, 332.

Interest.

place of performance of contract determines interest, and this may be place of investment, 333.

Barring Contracts.

federal bankrupt discharges operative in the United States; otherwise as to state insolvent discharges and foreign bankrupt discharges, 334.

when statutes of limitations are only processual, *lex fori* governs, 335.

foreign statutes barring debt not extra-territorial, 336.

Torts.

lex delicti commissi and *lex fori* must sustain suit, 337.

Succession, Wills, and Administration.

immovables governed by *lex rei sitae*, 338.

movables by *lex domicilii*, 339.

execution and administration have no extra-territorial power, 240.

Business Forms.

locus regit actum the general rule, 342.

Jurisdiction of Courts and Process.

local actions to be brought in local courts; otherwise as to transitory actions; process determined by *lex fori*, 343, 344.

extra-territorial summons now generally permitted, 344.

Evidence.

letters rogatory issue to obtain testimony in other countries, 345.

lex fori determines questions of evidence, 346.

admissibility of witnesses and documents so determined, 347.

foreign law proved as matter of fact, 348.

Lis Pendens.

prior foreign suit no bar, 349.

Criminal Jurisdiction.

country where offence takes effect has jurisdiction, 350.

offence may be cognizable in a plurality of jurisdictions, 351.

extradition generally limited by treaty, 352.

refused when there cannot be a fair trial, and when the object is political, 353.

state having jurisdiction ought not to surrender, 354.

terms should be construed as in asylum state; probable cause enough; evidence for defence admissible, 355.

circuit court may review case, and executive may refuse surrender, 356.

trial should be restricted to offence specified in demand, 357.

INTERNATIONAL LAW: PUBLIC.

Object and Nature.
international law is a law accepted by civilized nations to determine international rights, 118.
international law part of the common law, 119.
not the exclusive product of treaty, 120.
appeals to consciousness by right, 121.
based on decisions and on common consent, 122.
not necessary that there should be a court to enforce it, 123.
History.
in primitive times no such law recognized, 124.
tendencies in the middle ages, 125.
reformation cosmopolitan, 126.
Grotius the founder of the modern system, 127.
development under Louis XI., 128.
natural law prior to the French Revolution, 129.
French Revolution hostile to rights of states, 130.
Congress of Vienna appeals to legitimacy, 131.
consequences of fall of Orleans dynasty, 132.
modifications by treaty of Paris of 1856, 133.
tendencies to absorption of minor states, 134.
Independent Sovereignty, its inviolability and incidents.
such sovereignty essential to civilization, 135.
specific territory essential but not form of government, 136.
modes of sovereignty, 137.
sovereignties entitled to political deference, 138.
and to the protection of subjects, 139.
recognition dependent on discretion, 140.
belligerency may be distinctively recognized, 141.
devolution of duty on states seceding, 142.
individuality of parent states remains, 143.
mutual responsibilities of states and government, 144.
governments *de facto* are authoritative, 145.
territory inviolable, but modification as to self-defence, 146.
exception as to semi-civilized or barbarous states, 147.
right to trade secured by law of nations, 148.
pledges and servitudes of national property, 149.
servitude implied in neutralization, 150.
Acquisitions of Territory.
modes of acquiring, 151.
land added by accession, 152.
prescription gives title, 153.
cession does not divest old laws, 154.
Treaties.
classification, 155.
guaranty treaties, 156.

INTERNATIONAL LAW, PUBLIC—(*continued*).
treaties distinguishable from contracts, 157.
must be duly authorized and ratified, 158.
only parties bound by, 159.
pledges granted in, 160.
abrogated by war and other limitations, 161.
Diplomatic and Consular Agents.
diplomacy a system of law, 163.
ministers sent from government to government, 164.
belligerents may be represented, 165.
sending and reception a matter of discretion, 166.
inviolability and extra-territoriality of embassies, 167.
privilege extends to journey, 168.
classification, 169.
consuls not so privileged, 170.
may have jurisdiction in foreign lands, 171.
exequatur required, 172.
Intervention.
permissible in matters disturbing public peace, 174.
objections to European intervention in America, 175.
Naturalized and other Residents: Slaves.
naturalization now generally accepted, 177.
foreigners subjected to law of place of residence, 178.
may be excluded, 179.
duties pertaining to domicil, 180.
slave-trade no longer allowed, 181.
nor slavery by non-slaveholding states, 182.
Right to Sea and River.
open sea free to all nations, 185.
belt of sea within cannon-shot territorial, 186.
coast-line, that on which batteries can be placed, 187.
ship protected by flag, 188.
exception as to territorial waters, 189.
ships of war, 190.
navigable rivers open to all nations, 191.
inland seas territorial, 192.
Right of Search and Condemnation.
right of search not to be conceded in peace, 194.
otherwise as to belligerents in war, 195.
vessel seized to be taken to prize court, 196.
prize courts to be impartial and to keep full records, 197.
Piracy and Privateering.
piracy an offence by law of nations, 200.
privateers not pirates, 201.
Pacific Remedies for Wrongs.
international wrongs are delicts by law of nations, 203.

INTERNATIONAL LAW, PUBLIC—(*continued*).
extent of delicts still undetermined, 204.
restitution or indemnity, 205.
retortion and reprisal, 206.
embargo, 207.
mediation and arbitration, 208.
War and its Incidents.
war the final appeal, 209.
only states can be parties to, but involves all subjects, 210.
declaration should be formally made, 211.
provisional governments may be established, 212.
deception and great material destruction allowed, 213.
commerce with enemies prohibited, 214.
booty not permitted, 215.
public but not private property may be seized, 216.
distinction in this respect as to insurgents, 217.
conflict as to whether sailing under enemy's flag exposes neutral goods to seizure, 218.
English courts hold that doing business in a foreign land constitutes commercial domicil, 219.
seizable property *in transitu* cannot escape seizure by assignment, 220.
guerillas, when internationally sanctioned, 221.
on withdrawal of invasion old system revives, 222.
jus postliminii is right of owner of captured property to restoration, 223.
maritime law restores captured property on paying salvage, 224.
Contraband.
articles contraband of war may be forfeited, 226.
in cases of conspiracy ships may be confiscated, 227.
question as to dispatches and diplomatic agents, 228.
such agents may communicate through belligerent lines, 229
destination of ship imputed to goods, 230.
Blockade.
blockade must be effective, 233.
notice must be given, 234.
vessel running may be confiscated, 235.
Rights of Neutrals.
trade of neutrals to be protected, 238.
neutral waters ought not to be invaded, 239.
neutrality conditioned by circumstances, 240.
international and municipal neutrality not convertible, 241.
policy of the United States is to maintain neutral immunities, 242.
deviation from this policy during the civil war, 243.
rules of treaty of Washington limiting neutral rights not of permanent obligation, 244.
furnishing funds by subjects of neutral states to relieve belligerents not breach of neutrality; and so of loans, 245.

INTERNATIONAL LAW: PUBLIC—(*continued*).
belligerent may be furnished with munitions of war, 246.
belligerent recruiting in neutral state a breach of neutrality, 247.
so of giving passage to belligerent, 248.
permitting the fitting out and sailing of cruisers a breach of neutrality, 249.
freedom of sale not to be confounded with liability to confiscation, 250.
coaling forbidden from a constant base, 251.
INTER-OCEANIC CANAL, neutralization of, 150.
INTERPRETATION, by what law determined, 316.
INTERPRETATION OF STATUTES, rules as to, 604 *et seq.*
INTERPRETATIVE TREATIES, nature of, 155.
INTERSTATE COMMERCE:
constitution secures freedom of trade between states, 418.
this required by diversity of climate, of soil, of population, 419.
state cannot close interstate waters, 420.
United States has exclusive power of regulating foreign and interstate commerce, 421.
commerce may be regulated on land, 422.
exception as to matters of necessarily local law, 423.
quarantine laws are under state power. So of wharfage and pilotage laws, 424.
does not prevent states from exercising police exclusion, 425.
restriction does not touch purely interstate transactions, 426.
establishing by state of ferries and river improvements not forbidden, 427.
power authorizes laws limiting liability of ship owners, 428.
extends to rivers and tributary to lakes, 429.
tonnage duties prohibited, 430.
INTERSTATE LAW:
a law though not necessarily expressed by a sovereign, 26, *n.*
distinguishing features of, 26.
public acts and records of each state to be recognized in other states, 538.
question of extra-territorial service still open, 539.
citizens of each state entitled to citizenship in other states, 540.
fugitives from justice to be surrendered, 541.
must be "fleeing" from justice, 542.
demand must be based on *prima facie* case of crime, 543.
arrest may be had in advance of requisition, 544.
no defence that defendant is amenable in asylum state, 545.
fugitive not privileged from any but specified charge, 546.
governor of asylum state cannot be compelled to act, 547.
INTERSTATE NAVIGATION, under control of congress, 420.
INTERSTATE RIGHTS:
public acts and records of each state to be recognized in other states, 538.
question of extra-territorial service still open, 539.
citizens of each state entitled to citizenship in other states, 540.
fugitives from justice to be surrendered, 541.

INTERSTATE RIGHTS—(*continued*).
must be "fleeing" from justice, 542.
demand must be based on *prima facie* case of crime, 543.
arrest may be had in advance of requisition, 544.
no defence that defendant is amenable in asylum state, 545.
fugitives not privileged from any but specified charge, 546.
governor of asylum state cannot be compelled to act, 547.
INTERSTATE WATERS, cannot be closed by state, 420.
INTERVENTION:
permissible in matters disturbing public peace, 174.
objections to European intervention in America, 175.
INVADER may establish provisional government, 212.
INVASION OF FRIENDLY STATE, when excused by necessity, 146.
INVIOLABILITY OF TERRITORY, an international rule, 146.
"INVOLUNTARY SERVITUDE," meaning of, as abolished, 584.
IRON, when contraband of war, 226.
ISLANDS, international title to, 153.
ITALY, effect of consolidation of, 134.

JAY'S TREATY, question as to ratification of, 506.
JEFFERSON, defence of privateering, 201
views of, on constitution, 246, 365, 391, 414, 462.
JEOPARDY, meaning of, under constitution, 562.
JEWS, influence of, on international law, 126.
JOURNAL must be kept by houses of congress, 397.
"JUDGE-MADE LAW," a necessity of litigation, 30.
JUDGES, power of, in law making, 29 *et seq.* See COURTS; JUDICIARY.
power of, as to *habeas corpus*, 534 *et seq.*
JUDGMENTS, interstate, effect of, 538.
JUDICIAL EVOLUTION, necessity of, 29, 30.
JUDICIAL NOTICE taken of history, 359, 360.
JUDICIARY, POWERS OF:
judicial power of the United States extends to cases under United States constitution, laws, and treaties; to cases of admiralty and maritime jurisdiction; and cases in which the United States or states are parties, 516.
judicial powers are in the main apportioned by congress, 517.
supreme court has no general or final jurisdiction, 518.
supreme court has final jurisdiction in all conflicts with state courts as to Federal constitution and laws, 519.
"citizen" in the clause giving Federal courts jurisdiction means "resident," 520.
by statute cases may be removed from state to Federal court, 521.
political questions not of judicial cognizance, 522.
admiralty and maritime jurisdiction to be distinguished, 523.
Federal courts have no common law jurisdiction of crimes, but statutory jurisdiction is exclusive, 524.

JUDICIARY, POWERS OF—(*continued*).
territorial courts may be constituted by congress, 525.
Federal courts adopt state rules and practice as to state questions, 526.
in questions of concurrent jurisdiction, tribunal that first takes control retains it, 527.
United States may be sued in court of claims, 528.
cannot take cognizance of matters political, 389.
mischief arising from forcing on the judges political functions, 390.
cannot control executive, 391.
responsibility of, and restraints on, 394.
JURE DIVINO view of international law, 131.
JURIDICAL LAWS, distinctive features of, 1.
JURISDICTION, CONCURRENT, of Federal government and states, 381.
collision of, in criminal cases, 524.
in other cases, 527. See JUDICIARY.
JURISDICTION OF CRIMES, conflict as to, 350.
under Federal constitution, 579.
JURISDICTION, INTERNATIONAL, RULES AS TO:
local actions to be brought in local courts; otherwise as to transitory actions; process determined by *lex fori*, 343, 344.
extra-territorial summons now generally permitted, 344, 539. As to distinctive questions in the United States, see COURTS; JUDICIARY; CRIMES.
country where offence takes effect has jurisdiction, 350.
offence may be cognizable in a plurality of jurisdictions, 351. See, generally, INTERNATIONAL LAW.
JURISPRUDENCE. See LAW.
JURY must be impartial, 579.
JURY SYSTEM, evolution of law as to, 17.
JURY TRIAL secured in United States courts, 581.
JUSGENTIUM, nature of, 124.
JUSTICE, fugitives from, surrender of, 541.

KANT, views of, as to origin of law, 54.
KENT, CHANCELLOR, value of commentary of, 109.
view of, as to territorial waters, 192.

"LAISSEZ FAIRE," recognition of doctrine in law, 5, 28, 365. See 594.
LAKES, admiralty jurisdiction of, 523.
international relations of, 192.
LAKES, INLAND, under power of congress, 429.
LAW, DUE PROCESS OF, 566. See DUE PROCESS OF LAW.
LAW, HISTORY OF, 66 *et seq.*
old French law the foundation of Norman law, 66.
Anglo-Saxon law of distinctive origin, 67.
Anglo-Norman law a product of both, 68.
statutes distinguished from common law, 69.
practice as to writs, 70.

LAW, HISTORY OF—(*continued*).
peculiar value of ancient English records, 71.
authority of reports, 72.
law treatises, 73.
dialogues de Scaccario, 74.
Glanville, 75.
Bracton, 76.
Fleta, 77.
Gilbert of Thornton, 78.
Britton, 79.
Hingham, 80.
progress from the 14th century, 81.
early reports, 82.
treatises: Fortescue, De Laudibus, etc., 83.
Littleton, 84.
St. Jerman, Stamford, 85.
Hooker, Bacon, 86.
Coke, 87.
Blackstone, 88.
Objections based on his optimism and finality, 89.
Bentham as the champion of reform, 90.
Austin as a leader of juridical thought, 91.
defectiveness of his analysis, 92.
his theory of origin and authority of law unsatisfactory, 93.
and so of his view of development of law, 94.
system defective in leaving out of sight moral sense, 95.
rejection of moral sense not consistent with common law rulings, 96.
utility not a satisfactory substitute from its indefiniteness, 97.
so from its arbitrariness, 98.
so as ignoring national traditions, 99.
so as to national genius, 100.
Austin's conception of negligence defective, 101.
merits as a reformer, 102.
merits as vindicating "judiciary law," 103.
mystical and logical schools of utilitarians, 104.
distinctive views of Holland, 105.
of Herbert Spencer, 106.
reforms recently adopted in England, 107.
American jurists: Story, 108.
Kent, 109.
Wheaton, 110.
in this country the colonies received the common law as far as adapted to their particular conditions, 111.
recent English reforms anticipated in the United States, 112.
and so of "prevalence of equity," 113.
fixity of a code incompatible with destiny required by evolution, 114.

LAW, NATURE AND CLASSIFICATION:
term "law" to be restricted to the juridical government of man, 1.
law is based on express command or established rule, but not necessarily by a sovereign, 2.
as to scope, law may be international, federal, state, or municipal, 3.
object of law is distribution of justice, 4.
exceptions in cases of self-protection, 5.
schools of jurisprudence may be classified as "analytical," "theocratic," "ethical," and "historical," 6.
legal right is the right to control another, 7.
to a legal right it is essential that there should be a party privileged, a party bound, and a thing to be done, 8.
inappropriateness of term "rights of things," 9.
law a condition of liberty, 10.
"sanction" is the detriment imposed on disobedience, 11.
distinction between written and unwritten law illusory, 12.
statutory law is law imposed in fixed words, 13.
custom is the first stage in the formation of law, 14.
custom makes law, not law custom, 15.
common law the product of right reason based on national conscience and need, 16.
not essential to common law that it should have existed time out of mind, 17.
British constitution emanating from national conditions, 18.
so as to constitution of the United States, 19.
unconscious change of institutions illustrated by slavery, 20.
paper law giving way to instinctive and customary law, 21.
law made to bend to national conditions, 22.
illustrated in Pennsylvania, 23.
illustrated in Massachusetts, Rhode Island, and Louisiana, 24.
illustrated in other states, 25.
that a sanctioning sovereign is not essential shown by law of nations, interstate, and Indian law, 26.
laws not declaratory are inoperative, 27.
this position does not involve unchecked democracy, 28.
no case bound by exact precedent, 29.
necessary logical evolution by courts, 30.
this not necessarily arbitrary, 31.
nor is such law *ex post facto*, 32.
evolution not antagonistic to free-will or theism, 33.
process does not preclude occasional receding and revision, 34.
"prevalence of equity" in like manner "evolved," 35.
admiralty law is the law of the sea, 36.
martial law is the law by which an army is governed, 37.
military law is the law applied by a military commander to the territory occupied by him, 38.

LAW, THEORIES AS TO SOURCE OF:
importance of question involved, 42.
views of Socrates and Plato, 43.
Aristotle, 44.
Cicero, 45.
Scotius, 46.
Hooker, Bacon, and Hobbes, 47.
Pufendorff, 48.
Spinoza, 49.
Locke, 50.
Montesquieu, 51.
Blackstone, 52.
Burke, 53.
Kant, 54.
Savigny, 55.
Bentham and Austin, 56.
James Wilson, 57.
Herbert Spencer, 58.
inclination of authority is that law is the product of national conscience and need, 59.
conscience is not an insulated moral sense, but a combination of sense of right with reason and hereditary and traditional tendencies, 60.
custom the intermediate factor, 61.
primary law-making unconscious, 62.
authority may call for law, but law limits authority, 63.
common law in this country the product not of conquest, nor of colonization, but of adoption, 64.
LAW GIVER, how far necessarily a sovereign, 63.
LAW-MAKING, primary, unconscious and instinctive, 62.
LAWRENCE, W. B., as to privateering, 201.
LEAGUE, how distinguished from a constitution, 370.
LEGAL RIGHT, its nature, 8.
"LEGAL TENDER," constitutionality of laws respecting, 442.
LEGISLATION, importance of checks on, 362, 393.
requisites of, 598. See STATUTES.
LEGISLATURE to consist of two branches, 363.
question as to power of making perpetual contracts, 484 *et seq.*
cannot perform judicial acts, 388.
nor can it invade the province of the executive, 388.
LEGISLATURE, FEDERAL:
senate is the representative of the states, and has coördinate legislative powers, 395.
house of representatives elected by the people on state franchise, and has coördinate legislative powers; and elects its own speaker, 396.
each house determines its own elections and rules; is bound to keep a journal; requires a majority for a quorum; may punish for contempt;

LEGISLATURE, FEDERAL—(*continued*).
is limited as to adjournment; is privileged as to debate; and may expel members, 397.
president has a qualified veto, 398.
civil officers may be impeached, 399.
amendments may be made by convention or by action of congress and states, 400.
inferences to be drawn from the obstacles interposed, 401.
LEGISLATURE, STATE, checks on. See CONTRACTS; RECONSTRUCTION.
LEGISLATURES, distrust of, embodied in constitutional checks, 366.
less wise than people, 23, *n*.
necessity of curbing, 594.
LEGITIMACY, determined by *lex domicilii*, 254, 256.
not essential to title of government, 145.
position of congress of Vienna in respect to, 131.
LEGITIMATION, by what law established, 288.
LETTER OF CREDIT, law applicatory to, 315.
LEWIS, G. C., his views of origin of law, 2.
LEX DOMICILII, 254, 267. See DOMICIL.
LEX FORI, operation of law of, 315–322.
LEX LOCI ACTUS, operation of law of, 315–318.
LEX LOCI CONTRACTUS, operation of law of, 315.
LEX LOCI SOLUTIONIS, operation of law of, 315–319.
LEX REI SITAE, when applicable, 298 *et seq*.
LIBERTY, essential to law, 10.
LIBERTY AND PROPERTY, SAFEGUARDS OF; guaranty of republican institutions does not extend to suffrage or distribution of powers, 549.
nor to social equality, 550.
nor to exemption from revolution, 551.
but may sustain reconstruction after government has been suspended, 552.
neither religious test nor establishment of religions permitted, 553.
freedom of speech not to be abridged, 555.
right of petition guaranteed, 556.
right to bear arms not to be infringed, 557.
quartering soldiers forbidden, 558.
slavery abolished, 584 *et seq*. See RECONSTRUCTION; SLAVERY.
LICENSE LAWS, as to intoxicating liquors, how far constitutional, 424.
LICENSE TO TRADE, when given by belligerent, 214.
LICENSES, in charters, when open to withdrawal, 486.
LIENS, when open to statutory modification, 492.
LIFE cannot be taken except by due process of law, 564.
LIGHTWOOD, views of, as to source of law, 6, 100.
LIMITATION determined by *lex rei sitae*, 310.
LIMITATIONS, STATUTE OF, applicatory laws as to, 335.
when applicable to prior contracts, 492.

LINCOLN, President, his views as to reconstruction, 593, *n.*
his disapproval of speculative legislation, 593, *n.*
LIQUORS, SPIRITUOUS, how far taxable by states, 410.
LIS PENDENS, applicatory laws as to, 349.
LITTLETON, works of, 84.
LOANS to belligerent not internationally prohibited, 245.
LOCAL ACTIONS, where to be brought, 343.
LOCAL LAW, when to determine, as to state regulation of trade, 423.
LOCKE, views of, as to source of law, 50.
ineffectiveness of paper constitution by, 21.
LOCUS REGIT ACTUM, effect of rule, 342.
"LOG-ROLLING" in legislation, limitations on, 603.
LORIMER, views of, 28, 163, 170.
LOUIS NAPOLEON, effect of reign of, on international law, 133.
international recognition of, 153.
LOUIS PHILIPPE, fall of, effect on international law, 132.
LOUIS XIV., influence of, on international law, 128.
LOUISIANA, evolution of jurisprudence in, 24.
annexation of, a political necessity, 462. See 380.
LUNACY, by what law regulated, 296.
LUXOR CASE, question as to, 227.

MADISON, views of, 362, 370, 414, 596.
MAIL:
congress has power to make arrangements for postal service, 446.
question whether congress can create "post-roads" is political, and not judicial, 447.
"post-office" is any receptacle for mail matter, 448.
MAINE, SIR H., his views as to sovereignty and origin of law, 2, 56, *n.*
MAJORITY, absolute rule of, not consistent with American traditions, 361.
MANDATORY STATUTES, incidents of, 600.
MARAUDERS not to be regarded as belligerents, 210, 221.
MARION, international position of soldiers of, 221.
MARITIME CONTRACTS, applicatory law as to, 323.
MARITIME JURISDICTION, nature of, 523.
MARKET OVERT, abolished by usage, 23 *et seq.*
MARQUE AND REPRISAL, nature of, 201.
MARRIAGE not a contract under Federal constitution, 496.
MARRIAGE, INTERNATIONAL, RULES AS TO:
not a contract, but an institution, 271.
in this country, impediments reduced to consanguinity by descent and laterally in one degree, 272.
laws requiring consent of parents, state, or church not extra-territorial, 273.
divorced parties may be bound not to remarry, 274.
law of place of celebration determines mode of celebration, except when subjects of other states are excepted, or the local rites violate conscience or are barbarous, 275. See DIVORCE.

MARRIED WOMEN, domicil of, how determined, 257.
extra-territorial capacity of, 266.
invalid deeds of, may be validated, 568.
MARTIAL LAW is the law by which an army is governed, 37.
military law is the law applied by a military commander to the territory occupied by him, 38.
MASON AND SLIDELL, question as to seizure of, 228.
MASSACHUSETTS, evolution of law in, 24.
MEDIATION, how far internationally pacticable, 208.
MERCHANT SHIP follows law of flag, 188.
MIDDLE AGES, international law of, 125.
MILITARY GOVERNMENT, congress may establish, 459.
MILITARY LAW the law of a military commander, 38.
MILITARY POWER OF PRESIDENT, extent of, 503.
MILITIA, direction of, is under president, 457, 502.
MINISTERS, DIPLOMATIC:
diplomacy a system of law, 163.
ministers sent from government to government, 164.
belligerents may be represented, 165.
sending and reception a matter of discretion, 166.
inviolability and extra-territoriality of embassies, 167.
privilege extends to journey, 168.
classification, 169.
consuls not so privileged, 170.
may have jurisdiction in foreign lands, 171.
exequatur required, 172.
"MISCEGENERATION," laws as to, not unconstitutional, 587.
MISSISSIPPI RIVER, navigation of, 191.
cannot be obstructed by state, 420.
congress has power to regulate commerce on, 420.
MONEY AND BILLS OF CREDIT:
congress may coin money and regulate its value, 442.
state cannot issue bills of credit, 443.
congress may punish counterfeiting, 444.
MONROE DOCTRINE, its authority and scope, 174, 175.
MONTESQUIEU, views of, as to source of law, 51.
MORAL SENSE, appeal to, by international law, 121.
MORALITY, relations to law, 2, *n.*
MORTGAGE OF NATIONAL PROPERTY, law as to, 149.
MOTIVES OF LEGISLATORS not admissible to qualify statute, 611.
MOVABLES, governed by *lex rei sitae*, 304.
MUNICIPAL CORPORATIONS, charters of, may be modified, 485.
MUNITIONS OF WAR, how far contraband, 226.
may be furnished by neutrals, 246.
MUTABILITY OF LAW, a consequent of human mutability, 22–5, 86.

"NATIONAL ROADS," constitutionality of, 447.
NATIONALITY, effect of naturalization on, 177.
NATURALIZATION:
internationally conceded, 154, 177, 262, 431.
congress has power to establish uniform naturalizati
persons born in a state are subject to its jurisdiction
results from annexation, 433.
tribal Indians are not citizens, 434.
Chinese cannot be naturalized, 435.
aliens entitled to equal civil rights with citizens, 436
citizenship of a state does not involve citizenship
and the converse, 437.
foreigners subjected to law of place of residence, 17
may be excluded, 179.
duties pertaining to domicil, 180.
NATURE OF LAW, 1 *et seq.*
NAVIGABLE RIVERS, jurisdiction of congress over,
NAVIGATION of interstate waters, cannot be obstruct
NAVY, under control of president of the United States,
NAVY YARDS, jurisdiction over, 461.
NECESSITY, when a defence for invasion of friendly s
does not abrogate constitutional limitations, 380.
when may excuse destruction of property, 573, 576.
NEEDS OF PEOPLE, influencing formations of law,
NEGLIGENCE, defective classification of, 101.
NEGRO RACE, emancipation of, 584.
citizenship conferred on, 585.
equal civil rights granted to, 588 *et seq.*
NEUTRAL, cannot permit his territory to be occupied
NEUTRAL FLAGS, how far protecting goods, 218.
NEUTRAL SHIPS, subject to belligerent search, 195
NEUTRALS, RIGHTS OF:
trade of neutrals to be protected, 238.

NEUTRALS, RIGHTS OF—(*continued*).
furnishing funds by subjects of neutral states to relieve belligerents not breach of neutrality; and so of loans, 245.
belligerent may be furnished with munitions of war, 246.
belligerent recruiting in neutral state a breach of neutrality, 247.
so of giving passage to belligerent, 248.
permitting the fitting out and sailing of cruisers a breach of neutrality, 249.
freedom of sale not to be confounded with liability of confiscation, 250.
coaling forbidden from a constant base, 251.
NEUTRALIZATION, effect of treaties as to, 149, 150.
NEW ENGLAND, law adopted by, 25.
NEW STATES, admission of, 462. See 380.
NEW TRIALS, not grantable by legislature, 388.
NEW YORK, evolution of jurisprudence in, 25.
colonial laws adopted by, 25.
origin of distinctive law of, 64, *n*.
interstate waters, cannot be admitted by states, 820.
NORMAN LAW, how far part of English, 66.
NORMAN CONQUEST, effect on slavery, 20.
NORTH AMERICAN INDIANS, distinctive law concerning, 26, 265, 434, 585.
NOTES, treasury, laws providing for, 443.
NUISANCE, right to abate, 5.
charter does not protect, 487.

OBJECTIVE LAW, nature of, 2.
OCCUPATION, territory may be acquired by, 151.
effect of, by invading army, 212.
OCEAN, free to all flags, 185.
OFFENCES, international jurisdiction of, 350.
OFFICE, TENURE OF, not a contract under Federal constitution, 497.
OHIO RIVER, how far an interstate highway, 420.
OPIUM, constitutionalty of laws excluding, 425.
ORDINANCE OF 1787, effect of, on territory, 465.
ORLEANS DYNASTY, effect of fall of, on international law, 132.
ORIGIN of law, theories of, 42.
OYSTERS, local laws as to, 423.

PACIFIC REMEDIES OF NATIONS:
international wrongs are delicts by law of nations, 203.
extent of delicts still undetermined, 204.
restitution or indemnity, 205.
retortion and reprisal, 206.
embargo, 207.
mediation and arbitration, 208.

PACIFIC TERRITORY, annexation of, a necessary territorial growth, 462.
PAPACY, effect of, on international law, 125.
PARDON:
president has power to reprieve and pardon, 507.
exception as to impeachment and contempt, 508.
may be conditional, 509.
before sentence remits costs and penalties, 510.
PARENTAL RELATIONS:
how far ubiquitous, 288.
legitimation by subsequent marriage determined by laws of domicil of parent and child, 288.
as to real estate, territorial policy prevails, 289.
so as to legitimation generally, 290.
so as to adoption, 291.
PARIS, peace of, international guarantees of, 133, 201, 216.
declaration of, as to privateering, 201.
PARLIAMENT, distinctive features of, 362, 363, 368, 388, 393, 595.
"PARTISAN" WARFARE, nature of, 201–2, 221.
PARTNERSHIP, applicatory law as to, 329.
PARTY, cannot be compelled to criminate himself, 563.
PASSAGE OF STATUTE, must be in conformity with constitution, 386, 603.
PATENTS, laws respecting, 450.
PENAL LAWS, not extra-territorial, 253.
PENAL STATUTES, incidents of, 600, 618.
PENALTIES, when *ex post facto*, 472.
when implied from statute, 620.
PENN, WILLIAM, inoperativeness of charter to, 21, 23.
PENNSYLVANIA, spontaneous evolution of jurisprudence in, 23 *et seq.*
slavery established in, by usage, 20.
PEOPLE, the source of law, 18 *et seq.*
unconscious modification of law by, 22.
wiser than their legislators, 23, *n.*
meaning of the term, in preamble to Federal constitution, 371.
PERPETUAL FRANCHISES, dangers of, 483.
PERPETUITIES, inoperativeness of laws establishing, 27, 595.
PERSONAL PROPERTY, INTERNATIONAL RULES AS TO:
better opinion now is that it is governed by *lex rei sitae*, 304.
rule applies to liens, 305.
exception in respect to succession, marriage, and goods *in transitu*, 306.
title must be made in conformity with *lex rei sitae*, 307.
ships at sea governed by law of flag, 308.
debts subject to law of creditor's domicil, 309.
prescription, limitation, and escheat are governed by *lex rei sitae*, 310.
bankrupt assignments have no extra-territorial effect, 311.
PERSONS, of all classes, entitled to equal protection of the laws, 588.

PILOTAGE, how far under state control, 424.
PIRACY, to be internationally suppressed, 200.
an offence under constitution of the United States, 452.
does not include privateering, 201.
congress has jurisdiction over, 452.
PLATO, views of, as to origin of law, 43.
PLEBISCITE, unsafe as a mode of legislation, 28.
not consistent with Anglo-American institutions, 368.
PLEDGES OF NATIONAL PROPERTY, law as to, 149.
PLUNDER IN WAR, internationally forbidden, 213 *et seq.*, 216.
PLYMOUTH COLONISTS, laws adopted by them, 25.
POISON, forbidden in war, 213.
POLICE POWER, extent of, 425, 486–7, 490, 565.
quarantine laws are under state power. So of wharfage and pilotage laws, 424.
constitutional limitation does not prevent states from exercising police exclusion, 425.
charter does not protect from such supervision, 487, 488.
POLITICAL PENALTIES, how far *ex post facto*, 472.
POLITICAL QUESTIONS, not to be determined by judiciary, 389.
POLITICAL RIGHTS, not necessarily conferred by domicil, 260.
POLITICAL TESTS, inoperativeness of laws imposing, 27.
POLK, action of, as to Monroe doctrine, 175.
POLL TAX, limitations as to, 408.
POLLOCK, F., views as to origin of law, 2, *n.*
as to international law, 123.
POLYGAMY, has no extra-territorial effect, 271.
POPULAR ACTION, importance of checks on, 362.
POPULATION, growth of, since 1790, 380, *n.*
PORT LAW, how far controlling shipping, 189.
POSSESSION, right of, cannot be destroyed by law, 27.
POSTAL SERVICE:
Congress has power to make arrangements for postal service, 446.
question whether congress can create "post-roads" is political, and not judicial, 447.
"post-office" is any receptacle for mail matter, 448.
POSTLIMINII JUS, nature of, 223.
POWDER, when contraband of war, 226.
PREAMBLE, how far useful in exposition, 622.
PRECEDENT, no case absolutely bound by, 29.
PRESCRIPTION, international title by, 153.
determined by *lex rei sitae*, 310.
PRESIDENT OF THE UNITED STATES:
President commands army, navy, and militia, 502.
has no power, as commander-in-chief, to dispense with law as a system, 503.

PRESIDENT OF THE UNITED STATES—*continued.*
cabinet composed of heads of departments, 504.
president, with advice and consent of senate, may make treaties, 505.
treaties are in some respects self-enforcing, but not in respect to matte
requiring legislative action, 506.
president has power to reprieve and pardon, 507.
exception as to impeachment and contempt, 508.
pardons may be conditional, 509.
pardon before sentence remits costs and penalties, 510.
president has power of appointment and removal, 511.
has power of veto, 398.
has qualified legislative functions, 512.
cannot be controlled by judicial writ, 391, 399, 513.
the only representative internationally, 138.
PRESUMPTIONS, change of law as to, 17.
constitutionality of statutes modifying, 474.
PREVALENCE OF EQUITY, evolved in time, 35.
evolutions of, 113.
PRICES, cannot be regulated by law, 27.
PRIMOGENITURE abolished by usage, 23 *et seq.*
PRIVATE LAW, nature of, 2, *n.*
PRIVATE PROPERTY, not to be seized in war, 216.
cannot be taken without compensation, 569.
PRIVATE RIGHTS, extent of, 5.
PRIVATE STATUTES, incidents of, 598.
PRIVILEGE of member of congress, extent of, 397.
PRIZE COURT, duties of, 196–7.
PROCEDURE, laws modifying, may be constitutional, 492.
ex post facto, how far constitutional, 473.
PROCESS, applicatory law as to, 343.
PROSCRIPTION, POLITICAL, invalid, 471.
PROHIBITON OF, intoxicating liquors, constitutionality of, 425.
PROHIBITIVE DUTIES, how far constitutional 411–3, 415.
PROPERTY cannot be taken, except by due process of law, 564.
PROSECUTIONS, CRIMINAL, cannot be *ex post facto*, 474.
PROTECTION, taxes for, how far constitutional, 411.
PROTESTANTISM, effect of, on international law, 126.
PROVISIONAL GOVERNMENT, congress may establish, 459.
may be established by an invader, 212.
PRUSSIA, affect of aggrandizement of, 134.
PUBLIC DEBT, validity of, not to be questioned, 590.
PUBLIC LAW, nature of, 2, *n.*
PUBLIC OFFICERS, do not hold contractually under constitution, 497.
PUBLIC STATUTES, incidents of, 598.
PUBLICATIONS, indecent or illegal, prohibition of circulation of, 555.

PUCHTA, his views of origin of law, 2.
PÜFENDORFF, views of, as to source of law, 48.
PUNISHMENT, objects of, 4.
ex post facto, how far constitutional, 473.
PURITANS, views of, as to jurisprudence, 6, 24, 25, 86.

QUADRUPLE ALLIANCE, effect of, 174.
QUAKERS, influence of, on American law, 25.
QUARANTINE POWERS, states can exercise, 424.

RACE DISCRIMINATION:
slavery and involuntary servitude prohibited, 584.
citizenship confined to white and negro races, 585.
prohibition limited to state action, and not applicatory to discrimination by persons or corporations, 586.
laws imposing penalties on marriage between the races not unconstitutional, 587.
equal protection of laws granted to all persons, 588.
basis of representation to be reduced in proportion to abridgment of right of suffrage, 589.
RAILROAD CHARTERS, how far open to modification by legislature, 482 *et seq.*
RAILROADS, how far under state control, 489, 490.
may be postal-agencies, 446.
how far congress can regulate commerce on, 422.
growth of, in the United States, 380, *n.*
RATIFICATION, implied as well as express, of constitutional amendments, 593.
REAL ESTATE governed by *lex rei sitae*, 299.
REASON, office of, in evolution of law, 16, 596, 630.
RECAPTURE, effect of, on war, 223.
RECOGNITION OF FOREIGN STATES, rule as to, 140.
RECONSTRUCTION, after civil war, does not vary relations of sovereignties, 373, 586, 589.
slavery and involuntary servitude prohibited, 584.
citizenship confined to white and negro races, 585.
prohibition limited to state action, and not applicatory to discrimination by persons or corporations, 586.
laws imposing penalties on marriage between the races not unconstitutional, 587.
equal protection of laws granted to all persons, 588.
basis of representation to be reduced in proportion to abridgment of right of suffrage, 589.
validity of public debt not to be questioned, and assumption of insurrection and emancipation debts prohibited, 590.
legislation in support of this and other amendments must be "appropriate," 591.

RECRUITING, not to be permitted by neutral to be
REDRESS, PACIFIC, how intentionally obtained,
REDRESS OF INJURIES an object of law, 4.
REFORM an object of law, 4.
REFORMATION, effect of, on international law, 1
REFUGEES, POLITICAL, rule as to, 178.
REGISTRY OF DEEDS, introduced by usage, 23
RELIGIOUS TESTS, inoperativeness of laws impo
unconstitutional, 552.
REMEDIAL LEGISLATION, not necessarily unc
REMEDIAL STATUTES, incidents of, 600.
REMEDIES ON CONTRACT, may be modified,
REMOVAL FROM OFFICE, power of president
REMOVAL OF CASES, may be directed by Fede
REPEAL OF PRIOR STATUTES, when implie
effect of repeal, 627.
when worked by code, 625.
REPORTS, old English, authority of, 72, 83.
REPRESENTATIVES, house of, functions of, 396
REPRIEVE, power of, vested in president, 507.
REPRISAL, letters of, 201.
how far an international right, 206.
REPUBLICAN INSTITUTIONS guaranteed to t
effect of this guaranty, 552, 593.
RESIDUUM of sovereignty, where existing, 379, 5
RESTITUTION, when internationally awarded, 20
RETALIATION, how far an international right, 20
RETORSION, how far an international right, 206.
RETRIBUTION, the object of law, 4.
RETROACTIVE LAWS, how far constitutional, 4

REVOLUTION, English government based on, 89, 362.
and so of all governments, 145, 368.
REVOLUTION, not insured against by constitution, 551.
REVOLUTION, FRENCH, effect of, on law of nations, 130.
RHINE, free navigation of, 191.
RHODE ISLAND, evolution of law in, 24.
RIGHT, MEANING OF:
legal right is the right to control another, 7.
to a legal right it is essential that there should be a party privileged, a party bound, and a thing to be done, 8.
inappropriateness of term "rights of things," 9.
RIGHTS, equality of, granted by constitution, 588, 596.
"RIGHTS OF THINGS," insufficiency of term, 9.
RIVER, international title to bed of, 153.
RIVERS, NAVIGABLE, jurisdiction of congress over, 420.
ROMAN CATHOLIC THEOLOGY, relations of to international law, 126.
ROMAN LAW, influence of on colonial law, 24.
ROME, views in, as to international law, 124.
RUSSELL, Earl, views as to intervention, 174.

SACKING CITIES internationally forbidden, 213.
SAFEGUARDS OF LIBERTY AND PROPERTY, 561 *et seq.*
SALES, legislative validation of, 567 *et seq.*
"SANCTION," the detriment imposed on law-breaking, 11.
SANCTITY, of territory, internationally guaranteed, 146.
SAVIGNY, opposition of, to speculative legislation, 28.
views of, as to origin of law, 55–59.
SAXON SERFDOM, nature of, 20.
SCHOOLS may be constitutionally divided as to races, 588.
SCHOOLS OF JURISPRUDENCE, classification of, 6.
SCHUYLKILL RIVER, subject to state control, 420.
SEA, RIGHT TO:
open sea free to all nations, 185.
belt of sea within cannon-shot territorial, 186.
coast-line, that on which batteries can be placed, 187.
ship protected by flag, 188.
exception as to territorial waters, 189.
ships of war, 190.
navigable rivers open to all nations, 191.
inland seas territorial, 192. See ADMIRALTY.
SEARCH, RIGHT OF:
right of search not to be conceded in peace, 194.
otherwise as to belligerents in war, 195.
vessel seized to be taken to prize court, 196.
prize courts to be impartial, and to keep full records, 197.
SEARCHES, UNREASONABLE, forbidden, 560.

SECESSION, effect of, on debt of state seceded from, 142.
fallacy of, 370.
SECRETARIES, of public departments, when forming a cabinet, 504.
SECTIONS OF STATUTE, effect of conflict between, 628–9.
SEEBOHM, opinion as to village communities, 20.
SEIZURE, right of property at sea, 218–9.
"SEIZURE OF GOODS," how limited under constitution, 560.
SELF-DEFENCE, right of, inalienable, 5, 27.
SELF-CRIMINATION, under constitution, cannot be made compulsory, 5
SEMI-CIVILIZED STATES, how far governed by international rules, 1
170.
SENATE OF THE UNITED STATES, functions of, 395–7.
SERFS, characteristics of, in England, 20.
SERVANTS, how far bound by permanent indentures in old law, 20.
SERVICE, extra-territorial, validity of, 539.
SERVITUDE, forms of, in England, 20.
SERVITUDES OF INTERNATIONAL PROPERTY, law as to, 14
SETTLERS IN AMERICA, spontaneous moulding of law by, 23 *et seq.*
SEWARD, on privateering, 201, *n.*
on Monroe doctrine, 175.
on right of search, 194, 195 *a.*
as to transit by armed troops, 138.
on extradition, 548
SHIP AT SEA, governed by law of flag, 188, 308.
SHIP OWNERS, liability of, may be fixed by congress, 428.
SHIPS, when liable to seizure as carrying contraband, 227.
SHIPS OF WAR, territoriality of, 190.
SLAVE TRADE, how far piracy, 181.
colonial efforts to abolish, 365.
SLAVERY, came and went in England without legislation, 20.
course of, in the United States, 20, 584 *et seq.*
no longer internationally permitted, 182.
constitutional amendment in respect to, 584. See RECONSTRUCTION.
"SLAVES," when contraband of war, 226.
SLIDELL, seizure of, question as to, 228.
SMITH, ADAM, his views of foundation of law, 2.
SOCIAL EQUALITY, not guaranteed by constitution, 550.
not given by fourteenth amendment, 585–6.
SOCIALISM, inadequacy of laws as to, 27.
SOCRATES, views of, as to source of law, 43.
SOIL, international inviolability of, 139, 146, 239, 248.
SOLDIER, responsible only to his own sovereign, 139, 210.
SOLDIERS, quartering of, forbidden, 558.
SOURCE OF LAW, THEORIES AS TO:
importance of question involved, 42.
views of Socrates and Plato, 43.

SOURCE OF LAW, THEORIES AS TO—(*continued*).
Aristotle, 44.
Cicero, 45.
Grotius, 46.
Hooker, Bacon, and Hobbes, 47.
Pufendorff, 48.
Spinoza, 49.
Locke, 50.
Montesquieu, 51.
Blackstone, 52.
Burke, 53.
Kant, 54.
Savigny, 55.
Bentham and Austin, 56.
James Wilson, 57.
Herbert Spencer, 58.
inclination of authority is that law is the product of national conscience and need, 59.
conscience is not an insulated moral sense, but a combination of sense of right with reason and hereditary and traditional tendencies, 60.
custom the intermediate factor, 61.
primary law-making unconscious, 62.
authority may call for law, but law limits authority, 63.
common law in this country the product not of conquest, nor of colonization, but of adoption, 64.
SOUTH AMERICA, recognition of independence of, 175.
SOUTHERN CONFEDERACY, recognition of belligerency of, 141, 228.
SOVEREIGN, how far essential to law, 2, 6 *et seq.*, 26.
binds his subjects by his action, 144.
SOVEREIGNS, independence of, 135.
SOVEREIGNTY, in which way divisible, 596.
modes of, 137.
not necessarily absolute, 374.
essential to civilization, 136.
SPECULATIVE LEGISLATION, inoperativeness of, 23, *n.*
objected to by Burke, 27, 53, 365.
by Savigny, 28.
by Lincoln, 593.
SPEECH, FREEDOM OF, guaranteed, 555.
SPENCER, HERBERT, view of as to origin of law, 58.
view of as to evolution of law, 106.
SPINOZA, views of as to source of law, 49.
STAMFORD, treatise of, 85.
STATE, meaning of term, 374.
cannot close or obstruct interstate waters, 420.
only suable by states, and not by individuals, 530.

"STATE LAPSE," theory of, 874, 593.
STATE LAW, how far adopted by Federal courts, 5
STATE PRACTICE, how far adopted by Federal c
STATE, RESTRICTIONS OF COMMERCE BY
STATES, cannot tax Federal property or officers, 40
STATES AS PARTIES:
controversies between states include questions of b
states must be the real parties to sue, 531.
states can no longer be sued by individuals in Fed
precluded from coining money, or emitting bills o
STATES, INTERSTATE RIGHTS OF:
public acts and records of each state to be recogni
question of extra-territorial service still open, 539
citizens of each state entitled to citizenship in oth
fugitives from justice to be surrendered, 541.
must be "fleeing" from justice, 542.
demand must be based on *prima facie* case of crir
arrest may be had in advance of requisition, 544.
no defence that defendant is amenable in asylum s
fugitives not privileged from any but specified cha
governor of asylum state cannot be compelled to a
STATES, LIMITATION OF POWER OF:
as to checks on legislation, 362.
as to legislative encroachments on people, 365.
as to taxation, 409, 410.
as to foreign and interstate commerce, 418 *et seq.*
as to police matters, 425.
as to naturalization, 431.
as to insolvency, 439.
as to military service, 454.

STATES, LIMITATION OF POWER OF—(*continued*).
as to suffrage, 592.
as to public debts, 590.
STATES, RECEPTION INTO UNION, 380, 482.
STATES-RIGHTS SCHOOL, views of, 370 *et seq.*
error of, in making state legislatures too powerful, 595.
STATUS, interstate effect of, 540.
STATUS, PERSONAL, determined by *lex domicilii*, 254–5.
STATUTES, at common law, public or private, 598.
classified as enabling, enlarging, restraining, or disabling, 599.
and so as declaratory, penal, remedial, imperative (mandatory), and directory, 600.
legislative functions cannot be transferred to people, 601.
take effect on executive approval, 602.
must follow constitutional limitations as to title, as to cumulation, and as to enactment, 603.
construction to be distinguished from interpretation, 604.
question in this country modified by constitutional limitation, 605.
presumption in favor of constitutionality, 606.
may be unconstitutional in part, 607.
cannot be avoided for injustice or impolicy, 608.
rights cannot be taken away except by express enactment, 609.
statutes not to be construed retrospectively, 610.
motives of legislators not admissible, but intent to be gathered from words, 611.
and so of national antecedents and conditions, 612.
authoritative exposition to be followed, 613.
literal meaning when reasonable to be taken, 614.
when meaning is in doubt, fairest and most beneficial will be taken, 615.
common law and other statutes to be considered, 616.
common law may help out statute, 617.
penal statutes to be strictly construed, 618.
so of grants of franchises, 619.
prohibition implies penalty, and penalty prohibition, 620.
title may explain object, 621.
preamble not conclusive, 622.
repeal may be implied, 623.
statutes may become obsolete, 624.
codes or statutes may absorb prior statutes of common law, 625.
statutes may be cumulative, 626.
at common law repeal of repealing statute revives original statute, 627.
when clauses conflict, last clause is operative, 628.
division in sections has no logical effect, 629.
statutes depend on judiciary for recognition, for comprehension, and for application, 630.
judicial modifications of, 22.

STATUTES, BRITISH, accepted or rejected by colonies by popular action, 23.
STEAMBOATS may be postal agencies, 446.
STEAMSHIPS, sale of, how far a breach of neutrality, 241.
STEPHEN, SIR J. F., view of international law, 118.
STORY, JUDGE, value of works of, 108.
ST. JERMAN, treatise of, 85.
ST. LAWRENCE, navigation of, 191.
SUBJECTS, to be protected by sovereign, 139.
SUCCESSION, of personalty, determined by *lex rei sitae*, 306.
SUCCESSIONS, applicatory law as to, 338.
SUEZ CANAL, neutralization of, 150.
SUFFRAGE, RIGHT OF, representation adjusted to, 589.
granted to negro race, 592.
SUMPTUARY LAWS, inefficacy of, 27.
SUPERSTITIOUS USES, modification of law respecting, 25.
SUPREME COURT OF THE UNITED STATES, how far accepting state law, 526.
power of, see COURTS; JUDICIARY.
SUSPENSION OF HABEAS CORPUS, power of congress as to, 536.
SWEDES, their influence in forming colonial law, 23, *n*, 64.
SWEDISH LAWS, how far entering into our jurisprudence, 64.
SYNDICS, diplomatic position of, 163.

TARIFF PROTECTION, how far constitutional, 411–3, 415.
TAXATION:
power of taxation vested in congress, but taxing must be uniform, 404.
"tax" a generic term, 405.
taxation not necessarily conditioned on representation, 406.
direct taxation limited to poll and land tax, 407.
limitation as to exports does not attach to things that may be exported, nor to embargoes or inspection laws, 408.
United States government cannot tax state, nor state United States property, 409.
state taxes imposing terms on imports and on travel are unconstitutional. 410.
tax cannot be laid for merely private end, but the fact that a private end will be furthered will not vitiate tax for public purpose, 411.
power to tax involves power to establish tax machinery, 412.
congress has discretion as to objects, but not as to particular persons, 413.
collateral intent to protect does not vitiate tax, 414.
but not when duties are prohibitive, 415.
congress in borrowing money may give proper securities, 416.
borrowing implies the right to borrow through a bank, 417.
state may tax generally, 417 *a*.
TEMPLE, SIR W., his scheme as to cabinet council, 19.
TENURE OF OFFICE, not a contract under constitution, 497.
TERRITORIAL COURTS, congress may constitute, 525.

TERRITORIAL GOVERNMENTS, form of, determined by congress, 465.
TERRITORIAL WATERS, extent of, 186.
bill, discussion as to, 119.
"TERRITORIES," not included in term states, 375.
annexation of, how sustained, 462.
congress holds territories in trust, 462.
law to which they are subject, 463.
title to land of territories is in the United States, 463.
government to be under general safeguards of constitution, 464.
form of government at discretion of congress, 465.
TERRITORY, essential to a modern state, 136.
inviolability of, 139, 146, 239, 248.
how acquired, 151, 380, 462.
land added by accretion, 152.
prescription gives title, 153.
cession does not divest old laws, 154.
essential to sovereignty, 136 *et seq.* See SOVEREIGNTY.
TERRITORY OF UNITED STATES, expansion of, since 1790, 380, *n.*
TEST ACT, constitutionality of, 472.
TESTS, inoperativeness of laws imposing, 27.
religious, cannot be established by congress, 553.
TEXAS, annexation of, a political necessity, 463.
"THE PEOPLE," meaning of, in preamble to constitution, 371.
THEOCRATIC SCHOOL of jurisprudence, 6.
THINGS, applicatory law of, 298.
"THREE RULES," of treaty of Washington, effect of, 244.
TITLE, statute quieting, not unconstitutional, 567.
to land in territories, nature of, 464.
of statutes, when required to be exact, 603.
how far expository, 621.
TONNAGE DUTIES, states cannot impose, 430.
TORTS, applicatory law as to, 337.
TRADE between belligerents forbidden, 214.
foreign, how far an international right, 148.
foreign and interstate, under control of congress, 418 *et seq.*, 420–421.
TRADE: FOREIGN AND INTERSTATE:
power meant to secure freedom of trade between states, 418.
this required by diversity of climate, of soil, of population, 419.
state cannot close interstate waters, 420.
United States has exclusive power of regulating foreign and interstate commerce, 421.
commerce may be regulated on land, 422.
exception as to matters of necessarily local law, 423.
quarantine laws are under state power. So of wharfage and pilotage laws, 424.
does not prevent states from exercising police exclusion, 425.

See PREFACE.
TRANSITORY ACTIONS, where to be brought, 343.
TRANSPORTS, how far contraband, 228.
TREATIES, not the exclusive basis of international law.
classification, 155.
guaranty treaties, 156.
distinguishable from contracts, 157.
must be duly authorized and ratified, 158.
only parties bound by, 159.
pledges granted in, 160.
abrogated by war and other limitations, 161.
override antecedent federal statutes and all state stat
limitations in United States constitution in respect to
under Federal constitution, scope of, 505.
when self-enforcing, 506
supreme court has jurisdiction over, 519.
may annex territory, 380, 462.
TRENT, steamer, arrest of, 228.
TRIBAL INDIANS, not citizens, 434.
TURKEY, consular courts in, 147, 170.

UNIFICATION, mischief that would attend in the Unit
UNIFORMITY OF TAXATION, how far requisite,
UNION, FEDERAL, 359 *et seq.*, 596. See CONSTITU
UNION OF STATES, international effects of, 9, 137.
UNITED STATES, common law of, whence derived, 6
attitude as to privateering, 201.
consular regulations of, 170.
naturalization, practice as to, 147, 178, 431.
marginal waters of, extent of, 192.
policy of, is to maintain neutral rights, 242.
growth of, since 1790, 380 *n.*

UNITED STATES GOVERNMENT supreme within its orbit, 376.
UNITED STATES, POWER AS TO TAXATION, 404 *et seq.* See TAXATION.
USAGE. See CUSTOM.
the first stage in law, 14.
the basis of international law, 122.
UTILITY, not a safe basis for law, 97–100.
UTRECHT, peace of, effect of on international law, 128.

VATTEL, influence of works of, on international law, 129.
VERONA, CONGRESS OF, effect of, 175.
VERSAILLES, peace of, influence of on international law, 129.
VESSELS, how far contraband, 228.
VETO OF PRESIDENT, effect of, 398, 512.
VICE-PRESIDENT OF THE UNITED STATES, functions of, 295.
VICTOR EMMANUEL, influence of, on international law, 133.
VIENNA, CONGRESS OF, effect of, 120, 131, 174–5.
VILLAGE COMMUNITIES, how related to slavery, 20.
VILLEINAGE, nature of, in England, 20.
VILLEINS, position of, at common law, 20.
VIRGINIA, colonial law adopted by, 25.
evolution of jurisprudence in, 25.
position as to reconstruction, 584.
VISITATION, right of, at sea, extent of, 194.

WAIVER, of constitutional rights, 561 *et seq.*
WAR, CONSIDERED INTERNATIONALLY:
how far abrogating treaties, 160.
the final appeal, 209.
only states can be parties to, but involves all subjects, 210.
declarations should be formally made, 211.
provisional governments may be established, 212.
deception and great material destruction allowed, 213.
commerce with enemies prohibited, 214.
booty not permitted, 215.
public but not private property may be seized, 216.
distinction in this respect as to insurgents, 217.
conflict as to whether sailing under enemy's flag exposes neutral goods to seizure, 218.
English courts hold that doing business in a foreign land constitutes commercial domicil, 219.
seizable property *in transitu* cannot escape seizure by assignment, 220.
guerillas, when internationally sanctioned, 221.
on withdrawal of invasion old system revives, 222.
jus postliminii is right of owner of captured property to restoration, 223.
maritime law restores captured property on paying salvage, 224. See CONTRABAND; BLOCKADE; NEUTRAL.

supersede civil courts, 459.
WARD, power of guardian over, 295.
WARRANTS, GENERAL, forbidden, 560.
WAR-SHIPS, territoriality of, 190.
WASHINGTON, treaty of, rules of neutrality prescribed
WASHINGTON, PRESIDENT, view as to neutrality,
WATER COURSES, power over, 153, 420.
WEBSTER, his position in Dartmouth College Case, 483
views of, as to sovereignty of states, 372.
as to correllation of sovereignties, 378.
as to character of constitution, 362, 368, 36
as to neutrality, 174.
WHARFAGE DUES, may be imposed by states, 430.
WHARFAGE RULES, how far to be imposed by states
WHEATON, works of, value of, 110.
view of international law, 118.
WIFE, domicil of, how determined, 257.
when accepting husband's nationality, 177. See Div
WILKES, CAPTAIN, action of, in seizure of Trent, 22
WILLIAM III., influence on international law, 128.
WILLS, applicatory law as to, 338.
WILSON, JUDGE J., view of, as to origin of law, 58.
WITNESSES:
international rules as to, 345 *et seq.*
constitutional rights of, 563.
WOOLSEY, DR., views of, as to confederate belligerenc
as to privateering, 201.
as to territorial waters, 193.
as to right of search, 195 *b.*
as to Monroe doctrine, 175.
as to Trent Case, 228.
WRITS, old English, authority of, 70.
validity of, extra-territorial service of, 539.

TABLE OF CASES.

[THE FIGURES REFER TO SECTIONS.]

A.

SECTION

A. B. *v.* C. D., 34 N. J. Eq. 43 282
Abbot *v.* Rubber Co., 4 Blatch. 489 521
Abbotsford, The, 98 U. S. 440 613
Abercrombie *v.* Dupuis, 1 Cranch, 343 520
Ableman *v.* Booth, 21 How. 506 528
Acteon, The, 2 Dods. Ad. 48 195 *b*
Adams *v.* Bancroft, 3 Sumn. 384 625
v. Barney, 25 Vt. 225 5
v. Field, 21 Vt. 256 613
v. Graham, 33 L. J. Q. B. 71 615
v. Hackett, 7 Fost. 289 486
v. Nashville, 95 U. S. 19 526
v. Palmer, 51 Me. 480 388
v. Saratoga R. R., 10 N. Y. 328 609
v. Wood, 2 Cr. 336 622
Adela, The, 6 Wall. 266 239
Adelaide, The, 2 Rob. Ad. 111 234
Admiral, The, 3 Wall. 603 233, 234
Advocate, The, Blatch. Pr. C. 142 196
Ah Fong, *in re*, 3 Law. 144 425, 588
Ah Fook, *ex parte*, 49 Cal. 402 600
Ah Kow *v.* Nunan, 5 Sawy. 552 586, 588
Ah Lung, *in re*, 18 Fed. Rep. 28 383, 435
Ah Yup, *in re*, 5 Sawyer, 155 435
Aicardi *v.* Alabama, 19 Wall. 635 526
Aigburth, The, Blatch. Pr. C. 69 219
Ailesbury *v.* Pattison, 1 Dougl. 98 616
Alabama *v.* Georgia, 23 How. 505 530
Albertson *v.* State, 9 Neb. 429 628, 629
Alcorn *v.* Hamer, 38 Miss. 652 601
Alexander, The, 8 Cr. 169 214
4 Rob. Ad. 93 235
Alexander *v.* Bennett, 60 N. Y. 204 388
Alexander's Cotton, 2 Wall. 404 197, 216, 455, 467, 593
Allegheny City *v.* Moorehead, 80 Penn. St. 118 603
Allegheny Home's App., 77 Penn. St. 77 603, 621
Allen *v.* Colby, 47 N. H. 544 560
v. Hall, 14 Bush, 85 603
v. Louisiana, 103 U. S. 80 385
v. Tison, 50 Ga. 374 603
Alliance, The, Blatch. Pr. 262 214
Almy *v.* California, 24 How. 169 408, 421, 422
Alter's App., 67 Penn. St. 341 568
Alzena, The, 13 Weekly Notes, 63 424
Amalia, The, 1 Moore, P. C. N. S. 471 606
Amedie, The, 1 Acton, P. C. 240 181
American Ins. Co. *v.* Canter, 1 Pet. 511 375, 455, 462, 464, 505
Ames *v.* Port Huron Co., 11 Mich. 147 566
Ames Iron Works *v.* Warren, 78 Ind. 512 304
Amis *v.* Smith, 16 Pet. 303 526
Amoskeag Nat. Bank *v.* Ottawa, 105 U. S. 667 603
Amy Warwick, The, 2 Black, 635; 2 Spr. 123 218, 233, 454
Anderson *v.* Baker, 23 Md. 531 472
v. Com., 13 Bush, 485 601
v. Dunn, 6 Wheat. 204 397
Andrews *v.* People, 75 Ill. 605 623
v. Russell, 7 Blackf. 474 493
Ann, The, 1 Gall. 62 602
Anna, The, 5 Rob. Ad. 332 152, 237
Anna Catharina, 4 Rob. Ad. 107 219, 220
Anne, The, 3 Wheat. 435 170, 239
Ann Green, The, 1 Gall. 274 216, 219
Anthan *v.* Fisher, 2 Dougl. 649 214
Anon, 1 Dall. 1 23
Anstee *v.* Nelms, 26 L. J. Ex. 5 612
Antelope, The, 10 Wheat. 114 25, 136, 181
Antoni *v.* Greenhow, 107 U. S. 769 493

	SECTION
Antoni v. Wright, 22 Grat. 833	493
Appeal Tax Court v. Baltimore Cemetery Co., 50 Md. 432	413
v. Patterson, 50 Md. 534	413
v. Rice, 50 Md. 302	413
v. St. Peter's Academy, 50 Md. 321	413
Arabella, The, 2 Gall. 368	196
Ariadne, The, 2 Wheat. 143	218
Ariel, The, 11 Moore, P. C. 119	219
Armstrong's Foundry, 6 Wall. 766	510
Armstrong v. U. S., 13 Wall. 154	507
Arthur v. Dodge, 101 U. S. 34	625
Assessment Board v. R. R., 59 Ala. 551	566
Asylum v. New Orleans, 105 U. S. 362	482
Atkinson v. Dunlop, 50 Me. 111	492, 610
v. R. R., L. R. 6 Ex. 404	620
Atlantic R. R. v. Georgia, 98 U. S. 359	526
v. Hopkins, 94 U. S. 11	526
Attorney-General v. Brown, 1 Wis. 513	388
v. Kwok-a-Sing, L. R. 5 P. C. 179	200, 612
v. Parnther, 1 Bro. C. C. 409	602
v. Sillem, 2 H. & C. 431	249, 611
Auditor v. Atchison R. R. Co., 6 Kan. 500	388
Aultman's App., 98 Penn. St. 505	606
Austin v. R. R., 16 Rep. 548	569
Avon, The, 1 Brown, Adm. 170	523

B.

B. & C., The, 18 Fed. Rep. 543	523
Bachler's App., 90 Penn. St. 207	569
Backus v. Lebanon, 11 N. H. 19	575
Bacon v. Bacon, Cro. Car. 601	600
Bagg's App., 43 Penn. St. 512	388
Baigorry, The, 2 Wall. 474	233
Bailey v. Milner, 1 Abb. U. S. 261; 35 Ga. 330	443
Baker v. Portland, 5 Sawy. 566	283
v. State, 54 Wis. 368	588
Baldwin v. Flagg, 43 N. J. L. 495	493
v. Hale, 1 Wall. 223	439, 440, 495
Baldwin v. Newark, 38 N. J. L. 158	610
Baltazzia v. Ryder, 12 Moore, P. C. 168	220
Baltica, The, 11 Moore, P. C. 141	220
Baltimore, etc. R. R. v. Nesbit, 10 How. 395	567
Bambaugh v. Bambaugh, 11 S. & R. 192	23, 567
Banchor v. Gregory, 9 Mo. Ap. 102	315, 322
Bancroft v. Thayer, 5 Sawy. 502	588
Banda Booty, The, L. R. 1 Ad. & Ec. 109	196
Bangor R. R. v. Smith, 47 Me. 34	491
Bank v. Buckingham, 5 How. 317	526
v. Dudley, 2 Pet. 492	526
v. Supervisors, 7 Wall. 26	409, 416
Bank of Alabama v. Dalton, 9 How. 522	492
Bank of Chenango v. Brown, 26 N. Y. 467	601
Bank of Col. v. Oxley, 4 Wheat. 235	566, 571
Bank of Commerce v. New York, 2 Black, 620	409
Bank of Hamilton v. Dudley, 2 Pet. 492	385
Bank of Kentucky v. Wister, 2 Pet. 318	532
Bank of Rome v. Rome, 18 N. Y. 38	600, 601
Bank of Tennessee v. Woodson, 5 Caldwell, 176	214
Bank of U. S. v. Planter's Bank, 7 Wheat. 904	520
Bank Tax Case, 2 Wall. 200	409
Barbat v. Allen, 7 Ex. 609	611
Barber v. Irwin, 34 Ga. 27	456
Barlow v. Gregory, 31 Conn. 261	492
Barnes v. Barnes, 8 Jones (N. C.), 360	493
v. Jones, 51 Cal. 603	621
Barney v. Latham, 103 U. S. 205	521
Barrett, *in re*., 42 Barb. 479	456
Barrick v. Buber, 2 C. B., N. S., 563	214
Barrington's Case, 8 Rep. 136 *b*	598
Barry's Appeal, 88 Penn. St. 131	340
Petition, 12 R. I. 51	627
Barry v. Mercein, 5 How. 103	520
v. Viall, 12 R. I. 18	602
Barto v. Humrod, 4 Seld. 483	601
Bascom v. Albertson, 34 N. Y. 584	25
Bassett v. U. S., 2 Story, 389	630
Bates v. U. S., 11 Biss. 70	555
Bauman v. James, L. R. 3 Ch. Ap. 508	612

SECTION

Baxter *v.* Drake, 61 How. N. Y. Pr. 365 584
v. Tripp, 12 R. I. 310 612, 613
Beach *v.* Viles, 2 Pet. 675 526
Beauregard *v.* New Orleans, 18 How. 497 526
Beckerford, *in re*, 1 Dill. 45 439
Bedard *v.* Hall, 44 Ill. 91 603
Bedell *v.* Scruton, 54 Vt. 493 334
Bedford *v.* Shilling, 4 S. & R. 401 610
Beer Company *v.* Massachusetts, 97 U. S. 25 486, 487, 491, 565
Beers *v.* Haughton, 9 Pet. 329 492
Behn *v.* Burness, 3 B. & S. 751 612
Belfast, The, 7 Wall. 624 523
Bell *v.* Morrison, 1 Pet. 351 492, 526
v. Packard, 69 Me. 105 316
v. Reid, 1 M. & S. 726 214
Bella Guidita, 1 Rob. Ad. 307 214
Bello Corrunes, 6 Wheat. 152 170, 171
Bennett *v.* Bennett, Deady, 297 520
v. Boggs, Bald. 60 608
Bensley *v.* Bignold, 5 B. & Ald. 335 620
Berkeley Peerage, The, 4 Camp. 401 615
Berlin *v.* New Britain, 9 Conn. 175 385
Bermuda, The, 3 Wall. 514 226, 230, 250
Bernardi *v.* Motteux, Dougl. 581 195 *b*
Bernstein, *in re*, 3 Redf. 20 603
Berry *v.* Railroad, 41 Md. 446 603
Bertonneau *v.* Directors, 3 Woods, 177 586
Betts *v.* Bagley, 12 Pick. 572 495
Big Black Creek Co. *v.* Com., 94 Penn. St. 450 612
Bigelow *v.* Forrest, 9 Wall. 339 467
Bingham *v.* Cabbot, 3 Dall. 382 520
v. Miller, 17 Ohio, 445 613
Binghamton Bridge, The, 3 Wall. 51 488
Binz *v.* Weber, 81 Ill. 288 603
Bixby *v.* Janson, 6 Blatch. 315 170
Blackman *v.* Halves, 72 Ind. 515 566
Blades *v.* Higgs, 11 H. L. C. 621 5
Blagge *v.* Miles, 1 Story, 426 567
Blair *v.* Ridgely, 41 Mo. 63 472
v. Williams, 4 Litt. (Ky.) 34 493
Blake *v.* Brackett, 47 Me. 28 629
v. U. S., 103 U. S. 227 511
Blancan, *in re*, 4 Redf. (N. Y.) 151 339
Blanchard *v.* Sprague, 2 Story, 164 450
v. Warner, 1 Blatch. 258 450
Blessing *v.* Galveston, 42 Tex. 641 603

SECTION

Bliss *v.* Com., 2 Litt. (Ky.) 90 557
Blount's Case, Wh. St. Tr. 264 399
Blundell *v.* Gladstone, 3 McN. & G. 692 662
Board of Education *v.* Minor, 23 Oh. St. 211 553
v. Timson, 26 Kan. 1 586
Board of Liquidation *v.* McComb, 92 U. S. 531 493
Boehm *v.* Engle, 1 Dall. 15 23
Bogardus *v.* Trinity Church, 4 Paige, 178 25, 64
Bogart, *in re*, 2 Sawy. 396 459
Boggs *v.* Com., Sup. Ct. Va. 1883 423
Bolling *v.* Lersner, 91 U. S. 594 519
Bolton *v.* Gladstone, 5 East, 155 197
Bonaparte *v.* Tax Court, 104 U. S. 592 260, 409, 417 *a*
Bondurant *v.* Watson, 103 U. S. 281 526
Bonham's Case, 8 Rep. 114 *a* 606
Boom Co. *v.* Patterson, 98 U. S. 403 572, 578
Boon *v.* Howard, L. R. 9 C. P. 277 615
Boston Mining Co., *in re*, 51 Cal. 624 603, 621
Boswell *v.* Otis, 9 How. 336 539
Bouvier, *ex parte*, 27 L. T., N. S., 844 352
Bowler *v.* Huston, 30 Gratt. 356 538
Bowman *v.* Middleton, 1 Bay. 252 608, 615
Boyce *v.* Tabb, 18 Wall. 546 526
Boyd *v.* Alabama, 93 U. S. 645 487, 526, 621
Boyer's App., 13 Weekly Notes, 269 409
Boyer *v.* Sweet, 3 Scam. 120 25
Boyle *v.* Zacharie, 6 Pet. 648 526
Boyse, *in re*, 46 L. T., N. S., 522 345
Bradford *v.* Abend, 89 Ill. 78 278
Bradley *v.* West, 60 Mo. 33 603
Brady *v.* King, 53 Cal. 44 566
v. West, 50 Miss. 68 603
Brand *v.* Hammersmith R. Co., L. R., 2 Q. B. 223 615
Brent *v.* Chapman, 5 Cranch, 358 388
Brewster *v.* Hough, 10 N. H. 138 482
Brick Church *v.* N. Y., 5 Cow. 538 486
Bridges, *ex parte*, 2 Woods, 428 524
Briges *v.* Sperry, 95 U. S. 401 520
Briggs *v.* Georgia, 15 Verm. 61 600
Brighton *v.* Wilkinson, 2 Allen, 27 485
Briscoe, *in re*, 51 How. Pr. 422 543, 545, 547
Briscot *v.* Bank, 11 Pet. 257 443

SECTION

Britton *v.* Butler, 9 Blatch. 456 454
Broaddus *v.* Broaddus, 10 Bush, 299 625
Brodnax *v.* Groom, 64 N. C. 244 603
Bronson *v.* Kinzie, 1 How. 311 492, 493
v. Rodes, 7 Wall. 229 442
Brook *v.* Brook, 9 H. L. C. 193 275
Brooklyn Bridge, *ex parte*, 72 N. Y. 527 621
Brosnahan, *in re*, 18 Fed. Rep. 62 450, 524, 534, 588
Brown's Case, 112 Mass. 409 543
Brown *v.* Bridge, 106 Mass. 563 495
v. Clegg, 16 Q. B. 681 628
v. Hummel, 6 Barr, 86 481
v. Keene, 8 Pet. 112 520
v. Maryland, 12 Wheat. 419 410, 421
v. Nash, 1 Wy. Ter. 85 603
v. N. Y., 63 N. Y. 239 567
v. U. S., 8 Cr. 110 216
v. U. S., 14 Am. L. Reg. 566 524, 535
Browne, *ex parte*, 5 Cranch, C. C. 554 456
Buck *v.* Colbath, 3 Wall. 334 527
Buckwalter *v.* U. S., 11 S. & R. 193 381, 524
Bull *v.* Course, 13 Wis. 233 492
v. Read, 13 Gratt. 78 601
Bumgardner *v.* Circuit Ct., 4 Mo. 50 493
Bunn *v.* Gorgas, 41 Penn. St. 441 493
Burbank *v.* Whitney, 41 Mass. 146 25
Burd Orphan Asylum *v.* Darby, 90 Penn. St. 21 413
Burgess *v.* Seligman, 107 U. S. 20 480, 526
v. Wickham, 3 B. & S. 669 612
Burgett *v.* Burgett, 1 Ohio St. 469 621
Burke *v.* Savings Bank, 12 R. I. 513 566
v. Winkle, 2 S. & R. 189 28
Burlington R. R. *v.* Saunders Co., 9 Neb. 509 603
Burns *v.* Multnomah Railway, 8 Saw. 543 619
v. R. R., 15 Fed. Rep. 177 588
Burok *v.* Denman, 2 Exch. 167 181
Burr *v.* Ross, 19 Ark. 250 603
Burridge *v.* Nicholetts, 6 H. & N. 383 5
Burt *v.* Brigham, 117 Mass. 307 566, 576
Bush *v.* Kentucky, 107 U. S. 110 586
Butler *v.* Horwitz, 7 Wall. 258 441
v. Pennsylvania, 10 How. 402 497

SECTION

Butler *v.* Supervisors of Saginaw, 26 Mich. 22 56, 588
Butterfield *v.* Arthur, 16 Blatch. 216 625
Butz *v.* Muscatine, 8 Wall. 575 480, 526
Bywater *v.* Brandling, 7 B. & C. 643 622

C.

Cabrera, *ex parte*, 1 Wash. C. C. 232 167
Caledonian, The, 4 Wheat. 100 214, 218
Cal. Co. Grammar School *v.* Burt, 11 Vt. 632 481
Calder *v.* Butt, 2 Dall. 386 472, 474
v. Kurby, 5 Gray, 597 486
Calhoun *v.* McLendon, 42 Ga. 405 600
California Pac. R. R., *in re*, 3 Sawy. 270 439
Call *v.* Chadbourne, 46 Me. 206 601
v. Hagger, 8 Mass. 423 492, 494
Callahan *v.* Hurley, 93 U. S. 387 494
Calvin's Case, 7 Rep. 17 154
Campau *v.* Langley, 39 Mich. 451 566
Canal Appraisers *v.* People, 17 Wend. 570 64
Cannon, *in re*, 47 Mich. 481 541, 546
Cannon *v.* Hemphill, 7 Tex. 184 603
v. New Orleans, 20 Wall. 577 430
Cape Girardeau *v.* Dennis, 67 Mo. 438 577
Cargill *v.* Power, 1 Mich. 369 493
Carmichael *v.* Hays, 66 Ala. 543 625
Carolina, The, 4 Rob. Ad. 256 228
6 Rob. Ad. 336 214
Caroline, The, 6 Rob. Ad. 461 228
Carpenter *v.* King, 9 Met. 511 495
v. Shimer, 24 Hun, 464 610
Carpentier *v.* Ins. Co., 16 Pet. 495 526
Carroll *v.* Cass, 11 Chic. Leg. N. 14 547
v. Olmsted, 16 Ohio, 251 567
Carson *v.* Blazer, 2 Binn. 475 23
v. Carson, 40 Miss. 349 338
Carter *v.* Balfour, 19 Ala. 814 25
Carton *v.* Illinois Central R. R., 59 Iowa, 148 421, 489
Cassidy, *in re*, 13 R. I. 143 473
Caulfield *v.* Sullivan, 85 N. Y. 153 339
Cearfoss *v.* State, 42 Md. 403 612
Central Railroad Co. *v.* Green, 86 Penn. St. 421 586
Chaffraix *v.* Board of Liquidation, 11 Fed. Rep. 638 493

SECTION

Chamberlain *v.* Burlington, 19 Iowa, 395 480
Champion *v.* Wilson, 64 Ga. 184 319
Charles A. Sparks, The, 16 Fed. Rep. 486 424
Charles River Bridge *v.* Warren Bridge, 11 Pet. 418; 7 Pick. 344 488, 619
Charlotte, The, 5 Rob. Ad. 305 226
Charlotte Christine, The, 6 Rob. Ad. 101 233, 234
Chase *v.* Jefts, 58 N. H. 43 566
Chavasse, *ex parte*, 4 D. J. & S. 655; 34 L. J. N. S. By. 17 233, 246
Chemung Canal Bank *v.* Lowery, 93 U. S. 72 526
Cherokee Nation *v.* Georgia, 5 Pet. 1 434, 593
Cherokee Tobacco, The, 11 Wall. 616 25, 383, 434
Chesapeake Canal *v.* Balt. R. R., 4 Gill & J. 1 625
Chesapeake R. R. *v.* Hoard, 10 W. Va. 270 623
Cheshire, The, 3 Wall. 231 219, 230, 233
Chess *v.* State, 1 Blackf. 198 524
Chester, The, 2 Dall. 41 219
Chicago *v.* Robbins, 2 Black, 418 526
v. Rumsey, 87 Ill. 348 569
v. Sheldon, 9 Wall. 50 480, 526
Chicago Life Ins. Co. *v.* Auditor, 101 Ill. 82 492
Chicago R. R. *v.* Ackley, 94 U. S. 179 489, 490
v. Crawford, 48 Wis. 666 413
v. Iowa, 94 U. S. 155 365, 489
v. People, 67 Ill. 11 489
v. People, 105 Ill. 657 422
Chicot County *v.* Davis, 18 Cent. L. J. 10; 17 Rep. 141 603
Chin, *in re*, 18 Fed. Rep. 306 383
Chirac *v.* Chirac, 2 Wheat. 259 431
Choteau *v.* Richardson, 12 Allen, 365 440, 495
Christie *v.* Secretan, 8 T. R. 192 197
Christmas *v.* Russell, 5 Wall. 290 538
Christy *v.* Pidgeon, 4 Wall. 196 586
Church *v.* Hubbart, 2 Cranch, 187 186
v. Ruland, 64 Penn. St. 432 113
Chy Lung *v.* Freeman, 92 U. S. 275 423, 425
Cincinnati *v.* Rice, 15 Ohio, 225 553

SECTION

Circassian, The, 2 Wall. 135 233, 234
Clapham *v.* Langton, 5 B. & S. 729 612
Clark, *in re*, 9 Wend. 212 541, 543
Clark *v.* Board of Directors, 24 Iowa, 266 586
v. Clark, 10 N. H. 385 388
v. Mitchell, 69 Mo. 627 566
v. U. S., 3 Wash. C. C. 104 154
Clarke, *ex parte*, 100 U. S. 399 396, 468
Clarke *v.* Hayes, 9 Gray, 426 567
v. Rochester, 24 Barb. 446; 28 N. Y. 605 601
v. State, 23 Miss. 261 472
v. Tyler, 30 Grat. 134 493
v. Van Surlay, 15 Wend. 436 567
Clay *v.* Sudgrave, 1 Salk. 33 613
Claybrook *v.* Owensboro, 16 Fed. Rep. 297 586
Clepp *v.* Ely, 3 Dutch. 622 388
Clerk *v.* Russell, 3 Dall. 415 25
Clinton Bridge, *in re*, 1 Wool. 150 383, 422
Clinton *v.* Englebrecht, 13 Wall. 434 525
Close *v.* Glenwood, 107 U. S. 466 491
Clymene, The, 9 Fed. Rep. 164; 12 Fed. Rep. 346 424
Cochran *v.* Van Surlay, 20 Wend. 365 567
Coffin *v.* Coffin, 4 Mass. 1 397
v. Rich, 45 Me. 507 472
Coger *v.* Union Packet Co., 37 Iowa, 145 586
Cohens *v.* Virginia, 6 Wh. 264 461, 532
Coleman *v.* Tennessee, 97 U. S. 509 37, 459, 527
Collector *v.* Day, 11 Wall. 113 409
Collier *v.* Ferguson, 24 Ala. 108 368
Collins *v.* Collins, 80 N. Y. 1 279
v. Smith, 6 Whart. 294 627
Columbia, The, 1 Rob. Ad. 154 233
Commerce, The, 1 Black, 574 523
Commercen, The, 1 Wheat. 382 226
Commercial Bank *v.* Sparrow, 2 Denio, 7 603
Commissioners *v.* Bolles, 94 U. S. 104 603
v. Higginbotham 17 Kan. 62 603, 613
v. Slifer, 53 Penn. St. 71 621
Com. *v.* Alger, 7 Cush. 53 616
v. Ayer, 3 Cush. 150 625
v. Bacon, 6 S. & R. 522 497
v. Barry, 116 Mass. 1 381, 524
v. Beamish, 81 Penn. St. 339 524

SECTION

Com. v. Bearse, 132 Mass. 542 565
v. Churchhill, 2 Metc. 118 627
v. Clary, 8 Mass. 72 437, 461
v. Cooley, 10 Pick. 37 625
v. Davis, 12 Bush, 240 618
v. Dennis, 105 Mass. 162 625
v. Duffy, 96 Penn. St. 506 473
v. Eastern R. R., 103 Mass. 254 491
v. Erie R. R., 98 Penn. St. 127 623
v. Evans, 132 Mass. 11 565
v. Evans, 13 S. & R. 426 625
v. Fayette Co. R. R., 55 Penn. St. 452 491
v. Feely, 1 Va. Cas. 321 524
v. Felton, 101 Mass. 204 524
v. France, 2 Brewst. 568 23
v. Fuller, 8 Met. 313 381, 524
v. Gardner, 11 Gray, 438 472, 473
v. Getchell, 16 Pick. 452 472
v. Green, 17 Mass. 515 547
v. Hall, 9 Gray, 262 543
v. Hall, 97 Mass. 570 473
v. Halloway, 42 Penn. St. 446 388
v. Has, 122 Mass. 40 553
v. Hartnett, 3 Gray, 450 613
v. Hawes, 13 Bush, 697 546
v. Hitchings, 5 Gray, 482 385
v. Horregan, 127 Mass. 450 579
v. Hyneman, 101 Mass. 30 553
v. Judges, 8 Penn. St. 391 601
v. Keeper of Prison, 2 Ashm. 227 584
v. Kelliher, 12 Allen, 480 623
v. Kelly, 10 Cush. 69 474
v. Ketner, 8 W. N. C. 133 524
v. King, 1 Whart. 207 472
v. Knowlton, 2 Mass. 530 25
v. Luberg, 94 Penn. St. 85 524
v. Mann, 5 W. & S. 403 497
v. Miller, 2 Pars. 480 617
v. Montrose, 52 Penn. St. 391 616
v. Mott, 21 Pick. 492 472
v. Painter, 10 Penn. St. 214 601
v. Pottsville Water Co., 94 Penn. St. 516 482
v. Schaffer, 4 Dall. App. xxvi. 524
v. Shattuck, 4 Cush. 141 620
v. Smith, 76 Va. 477 622
v. Tenny, 97 Mass. 50 524
v. Wallace, 7 Gray, 222 474
v. Williams, 6 Gray, 1 474, 494
v. Wyatt, 6 Rand. 694 580
v. Wyman, 12 Cush. 237 472

SECTION

Compton v. Wilder, 7 Am. Law Rec. 212 547
Constitution, The, L. R., 4 P. D. 39 190
Conway v. Seamons, 55 Vt. 496
v. Taylor, 1 Black, 603 427, 526
Cook v. Cook, 56 Wis. 195 283
v. Moffatt, 5 How. 295 449
v. Neaff, 3 Yeates, 259 19
v. Pennsylvania, 97 U. S. 566 422
Cooley v. Port Wardens, 12 How. 299 410, 424
Coolidge v. Williams, 4 Mass. 140 619
Cooper v. Board of Works, 14 J. Scott, N. S. 180 586
v. Curtis, 30 Me. 488 602
v. Reynolds, 10 Wall. 308 530
Coosa, The, Newb. Ad. 393 283
Cope v. Doherty, 4 K. & J. 367; 2 De G. & J., 614 606, 609
Copeman v. Gallant, 1 P. Wms. 314 622
Corey v. Miller, 12 R. I. 337 584
Cornelius, The, 3 Wall. 214 234
Corning v. Greene, 23 Barb. 33 601
Cory v. Carter, 48 Md. 327 596
Cote v. U. S., 3 N. & H. 64 215
Cotter v. Sion Co., 6 Flor. 610 601
Cottrell v. State, 9 Neb. 125 603
Couch v. Steel, 3 El. & B. 402 620
County of Moultrie v. Bank, 92 U. S. 631 493
Coupland, *ex parte*, 26 Tex. 386 456
Covington v. St. Louis, 78 Ill. 548 623
Craig v. Church, 88 Penn. St. 42 603
v. Ins. Co., 1 Peters's C. C. 416 218
v. Missouri, 4 Peters, 410 443, 444
Crandall v. Nevada, 6 Wall. 35 421, 422
Crane v. Reader, 25 Mich. 303 262, 432
Cranson v. Smith, 37 Mich. 309 450
Crawford v. The William Penn, 3 Wash. C. C. 484 214, 250
Crespigny v. Wittenoom, 4 T. R. 790 622
Cromwell v. Ins. Co., 49 Md. 366 317
Cronise v. Cronise, 54 Penn. St. 255 388, 613
Cross v. Harrison, 16 How. 164 212
Crouse, *ex parte*, 4 Whart. 9 584
Crow Dog, *in re*, S. C. U. S. 1883 434
Crum v. Bliss, 47 Conn. 592 339
Cubbedge v. Napier, 62 Ala. 518 317
Cubreth, *in re*, 49 Cal. 436 544
Cummings v. Bank, 101 U. S. 153 404
v. Missouri, 4 Wall. 277 471, 472, 498

	SECTION
Curran *v.* Arkansas, 15 How. 304	481
v. Shattuck, 24 Cal. 421	609
Curtis, *ex parte*, 106 U. S. 171	555
Curtis *v.* Leavitt, 15 N. Y. 9	493
v. Whitney, 13 Wall. 68	492

D.

Dakins *v.* Seamon, 9 M. & W. 777	625
Dalby *v.* Ass. Co., 15 C. B., 365	34
v. Wolf, 14 Iowa, 228	601
Dallas *v.* Fosdick, 40 How. Pr. 249	586
Daly *v.* Maitland, 88 Penn. St. 384	480
Daniel *v.* Richmond, 78 Ky. 542	566
Daniel Ball, The, 10 Wall. 557	420, 429, 523
Danks *v.* Quackenbush, 1 Denio, 128; 3 Denio, 594; 1 N. Y., 129	494
Danville *v.* Pace, 25 Grat. 1	493
D'Anvilliers *v.* Her Husband, 32 La. An. 605	279
Darby *v.* Wilmington, 76 N. C. 133	385
D'Arcy *v.* Ketchum, 11 How. 165	538
Darling *v.* Berry, 13 Fed. Rep. 659	439
Darrington *v.* Bank, 13 How. 12	443
Dartmouth College *v.* Woodward, 4 Wheat. 518	481, 608
Dash *v.* Van Kleeck, 7 Johns. 477	610
Dashing *v.* State, 78 Ind. 357	524
Dashing Wave, The, 5 Wall. 170	195 *b*.
Davidson *v.* Clayland, 1 Har. & J. 546	621
v. New Orleans, 96 U. S. 97	566, 588
v. State, 4 Tex. Ap. 545	486
Davie *v.* Briggs, 97 U. S. 628	526
Davies *v.* McKeelby, 5 Nev. 369	472
Davis's Case, 122 Mass. 223	543
Davis *v.* State, 7 Md. 151	621
Davison *v.* Sealskins, 2 Paine, 324	146
Davy *v.* Turner, 1 Dall. 12	12
DeBow *v.* People, 1 Denio, 9	603
DeChastellux *v.* Fairchild, 15 Penn. St. 18	388
Decuir *v.* Benson, 27 La. Ann. 1	586
De Geer *v.* Stone, L. R. 22 Ch. D. 243	256
Dehon *v.* Foster, 4 Allen, 545	331
De Krafft *v.* Barney, 2 Black, 704	534
Delta, The, Blatch. Pr. C. 654	233
Den *v.* Goldtrap, Coxe (N. J.), 272	472
Dennick *v.* R. R., 103 U. S 11	337
Denny *v.* Faulkner, 22 Kan. 89	322, 344
v. Mattoon, 2 Allen, 361	388, 567
Dentzel *v.* Waldie, 30 Cal. 138	567
Denver R. R. *v.* Atchison R. R., 15 Fed. Rep. 650	421
De Ruyter *v.* St. Peters Church, 3 Barb. Ch. 119	64
De Treville *v.* Smalls, 98 U. S. 517	566
Detroit *v.* Plank Road, 43 Mich. 140	491, 566
Dewhurst *v.* Allegheny, 95 Penn. St. 437	603
De Wütz *v.* Hendricks, 2 Bing. 314	245
Diana, The, 1 Dods. 95	181
7 Wall. 354	233
2 Gall, 93	196
Dickerson *v.* Yetzer, 53 Iowa, 681	413
Dickey *v.* Turnpike Co., 7 Dana, 113	447
Dickinson *v.* Edwards, 58 How. (N. Y.) 24	317
Diggs *v.* Wolcott, 4 Cranch, 424	527
Diligentia, The, 1 Dods. Ad. 404	195 *b*
Dimes *v.* Proprietors, 3 H. L. C. 759	578
Direct U. S. Cable Co. *v.* Anglo Am. Tel. Co., L. R. 2 Ap. Ca. 419	194
Dist. of Col. *v.* Washington Market, 3 McArth. 559	611, 612, 613
Divina Pastora, The 4 Wheat. 52	140, 141
Dobbins *v.* Comm'rs, 16 Pet. 435	409
Dock Co. *v.* Browne, 2 B. & A. 43	619
Dodge *v.* Woolsey, 18 How. 331	376
Doe *v.* Acklam, 2 B. & Cres. 779	600
v. Benyon, 12 A. & E. 431	612
Dole *v.* Ins. Co., 6 Allen, 373; 2 Cliff. 394	201
Donahoe *v.* Richards, 38 Me. 376	553
Donegall *v.* Layard, 8 H. L. C. 460	611
Donnell *v.* State, 48 Miss. 661	586
Donohugh's App., 86 Penn. St. 306	413
Dorchester Co. *v.* Meekins, 50 Md. 28	603
Dorman *v.* State, 34 Ala. 216	608
Dorsey *v.* Gary, 37 Md. 64	388
v. Jackman, 1 S. & R. 42	34
Dortic *v.* Lockwood, 61 Ga. 293	581
Dos Hermanos, The, 10 Wheat. 306	201
Douglass *v.* Pike Co., 101 U. S. 677	526, 613
Dove *v.* School Dist., 41 Iowa, 689	586
Dow, *ex parte*, 3 How. 103	534
Dowling *v.* State, 13 Miss. 664	473
Doyle *v.* Falconer, L. R. 1 P. C. 328	397
Drake *v.* Rice, 130 Mass. 410	304
Dred Scott *v.* Sandford, 19 How. 393	437, 462, 464

SECTION

Drehman *v.* Stifle, 8 Wall. 595 472, 493, 536, 567
Drew *v.* R. R., 81* Penn. St. 46 567
Drummond *v.* Drummond, L. R. 2 Ch. Ap. 32 344
Dunbar *v.* Roxburghe, 3 Cl. & F. 335 613
Duncombe *v.* Prindle, 12 Iowa, 1 603
Dunham *v.* Williams, 37 N. Y. 251 64
Dunnovan *v.* Green, 57 Ill. 63 603
Durkee *v.* Board of Liquidation, 103 U. S. 646 481, 493, 603
Dyer *v.* Bridge Co., 2 Port. 296 486

E.

Eagle, The, 8 Wall. 15 523
Eakin *v.* Raub, 12 S. & R. 330 610
East Hartford *v.* Bridge Co., 10 How. 511 485
East Oakland *v.* Skinner, 94 U. S. 255 603
East Union *v.* Ryan, 86 Penn. St. 459 609, 619
Ebbs *v.* Boulnois, L. R. 10 Ch. Ap. 479 628
Eby's App., 70 Penn. St. 311 621
Eckert, *in re*, 10 Nat. B. R. 5 439
Edger *v.* Randolph Co., 70 Ind. 331 612, 613
Edgerly *v.* Bush, 81 N. Y. 199 315
Edinburgh R. R. *v.* Wauchope, 8 Cl. & F. 710 598
Edwards *v.* Elliott, 21 Wall. 532 379
v. Kearney, 96 U. S. 595 493
v. Pope, 4 Ill. 465 622
Edye *v.* Robertson, 18 Fed. Rep. 135; 16 Rep. 547 383, 421
Eld *v.* Gorham, 20 Conn. 8 603
Eleanor, The, 2 Wheat. 345 195 *b*
Electoral College, *ex parte*, 1 Hughes, 571 534
Ella Warley, The, Blatch. Pr. C. 204 195 *b*
Elliott *v.* Wohlfrom, 55 Cal. 384 279
Ellis *v.* Paige, 1 Pick. 43 625
Elmendorf *v.* Taylor, 10 Wh. 159 526
Elmwood *v.* Marcy, 92 U. S. 289 603
Elsabe, The, 4 Rob. Ad. 408 195 *b*
Elwood *v.* Flannigan, 104 U. S. 562 301
Ely *v.* Peck, 7 Conn. 239 524
Emanuel *v.* Constable, 3 Russell, 436 622
Emory's Case, 107 Mass. 172 564
Empress, The, Blatch. Pr. C. 175 233, 234
Engle *v.* Scheuerman, 40 Ga. 206 331
English *v.* Oliver, 28 Ark. 317 603

SECTION

Entwisle *v.* Dent, 1 Exch. 812 600
Erie R. R. *v.* Penn., 15 Wall. 282 482
v. State, 31 N. J. L. 531 422
Escanaba Transp. Co. *v.* Chicago, 107 U. S. 678 420
Esling's App., 89 Penn. St. 205 603
Esposito *v.* Bowden, 7 E. & B. 769 214
Estep *v.* Hutchman, 14 S. & R. 435 567
Estrella, The, 4 Wheat. 298 197
Etrusca, The, 3 Rob. Ad. 162 n. 239
Eureka *v.* Davis, 21 Kan. 578 603
Evans *v.* Browne, 30 Md. 514 603
v. Marlett, 1 Ld. Raym. 271 30
Evansville Bank *v.* Britton, 105 U. S. 322 409, 588
Everitt, *in re*, 9 Nat. B. R. 427 439
Everts, *ex parte*, 1 Bond, 197 520
Ewell *v.* Daggs, S. C. U. S. 1883 493
Ewing *v.* St. Louis, 5 Wall. 413 526
Exposito's Case, 24 Alb. L. J. 301 352

F.

Fairchild *v.* Gallatin, 100 U. S. 47 382, 526
Falcon, The, 6 Rob. Ad. 194 170
Bl. Pr. C. 52 196
Fales *v.* Wadsworth, 23 Me. 533 494
Fama, The, 5 Rob. Ad. 97 154
Fame, The, 3 Mason, 147 191
Fanny, The, 1 Dods. 443 218
Farrand, *in re*, 1 Abb. U. S. 140 534
Fay *v.* Montgomery, 1 Curt. 266 196
Felch *v.* Bugbee, 48 Mo. 9 440
Fell *v.* Burchett, 7 E. & B. 537 630
Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 487, 619
Fetter, *in re*, 3 Zabr. 311 544, 547
Field, *ex parte*, 5 Blatch. C. C. 63 536
Field *v.* Gooding, 106 Mass. 310 621
Fields *v.* State, Mart. & Yerg. 168 581
v. Stokely, 99 Penn. St. 306 5
Fifield *v.* Ins. Co., 47 Penn. St. 166 201
Findlay *v.* The William, 1 Pet. Ad. 12 197
First National Bank *v.* Hughes, 10 Mo. App. 7 304
Fisher *v.* McGirr, 1 Gray, 1 385, 560
v. Ogle, 1 Camp. 418 197
v. Parry, 68 Ind. 465 299
Fitch *v.* Remer, 1 Flip. C. C. 15 321
Fitzsimmons *v.* Newport Ins. Co., 4 Cr. 185 233, 234
Flanders *v.* Merrimack, 48 Wis. 567 616
Fleager *v.* Pool, 1 McLean, 185; 11 Pet. 185 139, 144

	SECTION
Fletcher *v.* Peck, 6 Cr. 87, 389, 472, 479, 606	
v. Rhode Island, 5 How. 504	425
Florida, The, 4 Ben. 452	250
Flying Scud, The, 6 Wall. 263	467
Folger *v.* Ins. Co., 99 Mass. 267	538
Foot *v.* Prowse, Strange, 625	600
Foote *v.* State, 59 Md. 264	580
Forbes *v.* Halsey, 26 N. Y. 53	494
Force *v.* Batavia, 61 Ill. 99	603
Ford, Matter of, 6 Lans. 92	588
Ford *v.* Surget, 97 U. S. 594 141, 145, 178, 201, 210,	212
Fordyce *v.* Godman, 20 Oh. St. 1	603
Forster *v.* Forster, 129 Mass. 559	567
Fort Plains, etc., Co. *v.* Smith, 30 N. Y. 44	485
Foster *v.* Banbury, 3 Sim. 40	622
v. Essex Bank, 16 Mass. 245	567
v. Master, etc., 94 U. S. 246	420
v. Morse, 132 Mass. 354	566
v. Nelson, 2 Pet. 254 383,	389
v. New Orleans, 94 U. S. 246	408
Fouke *v.* Fleming, 13 Md. 392	603
Fowler *v.* Lindsay, 3 Dall. 411	531
v. Pirkins, 77 Ill. 271	623
Fox *v.* Cincinnati, 104 U. S. 783	565
v. Ohio, 5 How. 410 381, 524,	562
Foxcroft *v.* Mallett, 4 How. 333	526
Frances, The, 8 Cr. 335; 1 Gall. 453	220
Francois, *ex parte*, 3 Woods, 367	587
Franklin, The, 3 Rob. Ad. 217	227
Fraser, *ex parte*, 54 Cal. 94	385
Frasher *v.* State, 3 Tex. Ap. 263	587
Fredericks *v.* Davis, 3 Montana, 251	342
Free *v.* Burgoyne, 5 B. & C. 400	622
Freeman *v.* Howe, 24 How. 450	527
French *v.* Wade, 102 U. S. 132	467
Friendschaft, The, 3 Wheat. 15; 4 Wheat. 105	216
Frost *v.* Wilson, 70 Mo. 664	621
Fugitive Slave Law, 1 Blatch. 635	534
Funk *v.* Voneida, 11 S. & R. 109	113
Fuman *v.* Nichol, 8 Wall. 44 493,	519

G.

	SECTION
Gable *v.* Scott, 56 Md. 176	610
Gaetano, The, 46 L. T., N. S., 835	308
Gage *v.* Bussee, 7 Ill. App. 433	411
Gaines *v.* Thompson, 7 Wall. 347	513
Gallbraith *v.* Com., 14 Penn. St. 258	571
Galveston Co. *v.* Gorham, 49 Tex. 279	422
Gamble *v.* McCrady, 75 N. C. 509	385
Garcia *v.* Lee, 12 Pet. 511	505
v. Territory, 1 New Mex. 415	580
Gardner *v.* Collector, 6 Wall. 499 602,	603
Garland, *ex parte*, 4 Wall. 333 471, 472,	507
Garvey *v.* People, S. C. Col. 1883	472
Gass *v.* Wilhite, 2 Dana, 170	25
Gates *v.* Brooks, 59 Iowa, 510	606
Gebhard *v.* R. R., 17 Blatch. 416	608
Geddes *v.* Brown, 5 Phila. Rep. 180	480
Geebrick *v.* State, 5 Clarke (Ia.), 491	601
Geiger *v.* McLin, 78 Ky. 232	603
Gelpcke *v.* Dubuque, 1 Wall. 175 480,	526
Gelston *v.* Hoyt, 5 Wheat. 246; 1 Johns. 543	389
General Pinckney, The, Blatch. Pr. C. 668	216
General Smith, The, 4 Wheat. 438	522
Genesee Chief, The, 12 How. 443	523
George *v.* Skeates, 19 Ala. 736	625
Georgia, The, 8 Ben. 392	424
1 Low. Dec. 96	250
Georgia *v.* Atkins, 1 Abb. U. S. 29	409
v. Stanton, 6 Wall. 50 389, 513,	593
Gerasimo, The, 11 Moore P. C. 88	219
German Savings Bk. *v.* Archbold, 15 Blatch. 398 404,	413
Gibbs *v.* Gale, 7 Md. 76	494
Gibbons *v.* Brittenum, 56 Miss. 232 616, 628,	629
v. Ogden, 9 Wheat. 203 408,	420
Giddings *v.* Cox, 31 Vt. 607	625
Gifford *v.* New Jersey R. R., 2 Stockt. 172	603
Gilfillin *v.* Canal Co., S. C. U. S. 1883	492
Gilman *v.* McArdle, 16 Chic. Leg. N. 17	25
v. Philadelphia, 3 Wall. 713	420
Gilmer *v.* Lime Point, 19 Cal. 47	609
Gilmore *v.* Sapp, 100 Ill. 297	566
Girard *v.* Philadelphia, 7 Wall. 1	485
Gittings *v.* Crawford, Taney, 1	170
Glass *v.* Sloop Betsey, 3 Dall. 6	196
Glover's Test Case, 41 Mo. 339	472
Gloucester Ins. Co. *v.* Younger, 2 Curt. 322	526
Godfrey *v.* Terry, 97 U. S. 171 477,	493
Going *v.* Emory, 33 Mass. 107	25

SECTION

Goldshede *v.* Swan, 1 Ex. 154 612
Goldsmith *v.* R. R., 62 Ga. 468 611
62 Ga. 473 621
Goldwashing Co. *v.* Keyes, 96 U. S. 199 521
Goodman's Trusts, 17 Ch. D. 266; 14 Ch. D. 619 289
Goodman *v.* Simonds, 20 How. 343 603
Gordon *v.* Caldeleugh, 3 Cranch, 268 519
v. Tax Court, 3 How. 133 481, 482
Gorham *v.* Bishop of Exeter, 5 Ex. 630 611, 612
Goshen *v.* Stonington, 4 Com. 209 568, 615
Goshorn *v.* Purcell, 11 Oh. St. 641 567
Governor *v.* Madrazo, 1 Pet. 110 531
Grace *v.* Bishop, 11 Ex. 424 615
v. Ins. Co., S. C. U. S. 1883 520
Graham *v.* Bank, 84 N. Y. 393 319
v. Merrill, 5 Caldwell, 622 214
Gran Para, The, 7 Wheat. 471 197
Granger *v.* Buffalo, 6 Abb. N. C. 238 566
Grant *v.* Courter, 24 Barb. 232 601
v. Grant, 12 S. C. 29 278
Grape Shot, The, 9 Wall. 129 455
Gray *v.* Larrimore, 2 Abb. U. S. 542 609
v. Obear, 54 Ga. 231 627
Gray Jacket, The, 5 Wall. 370 219, 467
Gregley *v.* Jackson, 38 Ark. 487 571
Green *v.* Barry, 15 Wall. 610 493
v. Biddle, 8 Wheat. 1 606
v. Graves, 1 Doug. 351 603
v. Neal, 6 Pet. 291 526
v. State, Sup. Ct. Ala. 1882 586
v. Weller, 32 Miss. 650 603
Greene *v.* Briggs, 1 Curt. 311 560
Greenough, *in re*, 31 Vt. 279 542, 547
Greenwood *v.* Freight Co., 105 U. S. 13 481, 491
Griffin, *in re*, 25 Tex. (Sup.) 623; Chase, Dec. 364 534
Griffin *v.* Graham, 1 Hawks, 96 25
v. Wilcox, 21 Ind. 370 536
Grob *v.* Cushman, 45 Ill. 119 603
Groesbeck *v.* Seeley, 13 Mich. 329 494
Gross *v.* Rice, 71 Me. 24 566
Guaranty Co. *v.* Board of Liquidation, 105 U. S. 622 492
Guardians of the Poor *v.* Greene, 5 Binn. 554 23
Guernsey *v.* Wood, 130 Mass. 503 495
Guinet's Case, Whart. St. Tr. 93 201, 249
Gunn *v.* Barry, 5 Wall. 610 493, 551
Gut *v.* State, 9 Wall. 35 473

SECTION

Gute Erwartung, The, 6 Rob. Ad. 182 234
Gutzweller *v.* People, 14 Ill. 142 485
Guy *v.* Baltimore, 100 U. S. 434 410, 422
v. Rainey, 71 Ill. 221 325

H.

Hackett *v.* Ottowa, 99 U. S. 86 572
Hadden *v.* Collector, 5 Wall. 107 621
Hagan *v.* Lucas, 10 Pet. 400 527
Hale *v.* Lawrence, 1 Zab. 714 576
Hall *v.* De Cuir, 95 U. S. 485 408, 421, 423, 526
v. Keese, 31 Tex. 504 455
v. Lanning, 91 U. S. 160 538
v. Wisconsin, 103 U. S. 479, 493, 497
Hallie Jackson, The, Blatch. Pr. C. 2, 41 234
Ham *v.* State, 4 Tex. Ap. 645 546
Hammond *v.* Haines, 25 Md. 541 601
Hampton, The, 5 Wall. 372 220
Hand *v.* Ballou, 12 N. Y. 541 494
Hand Gold Co. *v.* Parker, 59 Ga. 419 575
Haney *v.* State, 34 Ark. 263 603
Harding *v.* Williams, 14 Ch. D. 197 622
Harlan *v.* People, 1 Doug. (Mich.) 207 524
Harmony's Case. 13 How. 115 37
Harmony Fire Co *v.* Fire Ass., 35 Penn. St. 496 23
Harpending *v.* Dutch Church, 16 Pet. 455 526
v. Haight, 39 Cal. 189 611
Harper *v.* Ampt, 32 Ohio St. 291 491
v. Rowe, 53 Cal. 223 566
Harrington *v.* Lumber Co., 129 Mass. 580 422
v. Wands, 23 Mich. 385 621
Harris *v.* Harris, 61 Ind. 117 539
v. People, 59 N. Y. 599 603
Harrod *v.* Worship, 1 B. & S. 381 614
Hart, The, 3 Wall. 559; Bl. Pr. C. 379 218
Hart *v.* People, 26 Hun, 396 555
v. Wills, 52 Iowa, 56 325
Hartung *v.* People, 22 N. Y. 95 472
Harvard College *v.* Stearne, 15 Gray, 1 5
Harvey *v.* Farnie, 5 P. D. 153; 48 L. T. N. S. 273 279, 282
v. Thomas, 10 Watts, 63 574
Hastings *v.* Aiken, 1 Gray, 163 627

	SECTION
Hastings *v.* Crunkleton, 3 Yeates, 261	23
v. Forsyth, 27 Vt. 646	584
Hauenstein *v.* Lynham, 100 U. S. 483	436, 506
Havelock *v.* Rockwood, 8 T. R. 268	196
Havemeyer *v.* Iowa Co., 3 Wall. 297	480
Haver *v.* Yaker, 9 Wall. 32	154
Hawkins *v.* Barney's Lessee, 5 Pet. 457	492
Hawthorne, *in re*, Graham *v.* Massey, 48 L. T. N. S. 701	299
Hawthorne *v.* Calef, 2 Wall. 10	481
Haym *v.* U. S., 7 N. & H. 443	509
Hazen *v.* Bank, 1 Sneed, 115	481
Hearn *v.* Glanville, 48 L. T. N. S. 356	282
Hebblethwaite *v.* Hepworth, 98 Ill. 126	275
Hebler, *ex parte*, 43 Tex. 197	547
Heerman *v.* Beef Slough Co., 8 Biss. 334	420
Heine *v.* Levee Com., 19 Wall. 655	388
Helen, The, L. R. 1 Ad. & Ec. 1	233, 246
Helena, The, 4 Rob. Ad. 3	136
Henderson's Tobacco, 11 Wall. 652	623, 625
Henderson *v.* Griffin, 5 Pet. 151	526
v. N. Y., 92 U. S. 259	421, 425
Hendrick *v.* Com., 5 Leigh, 707	524
Henfield's Case, Whart. St. Tr. 49	201, 249
Hennen *v.* Gilman, 20 La. An. 241	214
Hepburn *v.* Griswold, 8 Wall. 603	442
Herin *v.* State, 1 Oh. St. 15	486
Hermance, *in re*, 71 N. Y. 481	615
Hersch *v.* U. S., 15 N. & H. 385	572
Herstelder, The, 1 Rob. Ad. 114	196
Hess *v.* Johnson, 3 W. Va. 645	536
Hestonville R. R. *v.* Philadelphia, 89 Penn. St. 210	498
Hewitt *v.* Railroad, 12 Blatch. 452	491
Hiawatha, The, 2 Blatch. 635; Blatch. P. C. 1	233, 593
Hibbard *v.* People, 4 Mich. 126	560
Hickey, *ex parte*, 4 Sm. & M. 751	508
Hickman *v.* Jones, 9 Wall. 197	593
Hill *v.* Decatur, 22 Ga. 203	603
v. Mandenhall, 21 Wall. 453	538
v. Spear, 30 N. H. 253	319
v. State, 17 Wis. 675	579
Hills *v.* Carlton, 74 Me. 156	440
Hillyard *v.* Miller, 10 Penn. St. 326	568
Hilton *v.* U. S., 6 Dall. 171	407
Hind *v.* Rice, 10 Bush. 528	603
Hine *v.* Trevor, 4 Wall. 555	523
Hinson *v.* Lott, 8 Wall. 148	422
Hinze *v.* People, 92 Ill. 406	385
Hoag *v.* Peck, 62 Barb. 545	609
Hobart *v.* Supervisors, 17 Cal. 23	601
Hobbs *v.* Henning, 17 C. B. N. S. 791	197, 230, 246
Hoffnung, The, 6 Rob. Ad. 112	233
Hoge *v.* Railroad, 99 U. S. 398	413
Holbrook *v.* Henderson, 4 Sandf. 619	168
v. Holbrook, 1 Pick. 248	622
Holliday *v.* People, 4 Gilm. 111	579
Holman, *ex parte*, 28 Iowa, 88	480
Home of the Friendless *v.* Rouse, 8 Wall. 430	482
Hope, The, Dods. Ad. 226	170
Hornbuckle *v.* Toombs, 18 Wall. 648	525
Horne *v.* State, 84 N. C. 362	493
Hornthal *v.* Collector, 9 Wall. 560	520
Horstman, Kaufman, 97 Penn. St. 147	563
Houghton, *ex parte*, 7 Fed. Rep. 657; 24 Alb. L. J. 145	524
Houston *v.* Moore, 5 Wheat. 1	457, 524
Houston R. R. *v.* Odwin, 53 Tex. 343	603
Howard *v.* Bugbee, 24 How. 461	493
v. Moot, 64 N. Y. 262	494
Howland Coal Co. *v.* Brown, 13 Bush, 681	621
Hubbard *v.* Brainard, 35 Conn. 563	566
Huber *v.* Reily, 53 Penn. St. 112	616
Hudson *v.* Ede, L. R. 3 Q. B. 412	612
v. Mestier, 6 Cranch, 281	187, 196
Hughes, *in re*, Phill. N. C. L. 57	541
Hughes *v.* R. R., 1 Dr. & Sm. 524	622
v. R. R., 1 West Coast Rep. 26	614
v. State, 12 Ala. 458	617
Hull *v.* Miller, 4 Neb. 503	603
Hunt *v.* Jones, 12 R. I. 265	317
v. Van Alstyne, 25 Wend. 605	603
Hunter *v.* Wilson, 19 L. J. (N. S.) Ex. 8	603
Hurlburt *v.* Banks, 52 How. Pr. 196	621
Hurlbut *v.* Britain, 2 Dougl. 191	603
Huse *v.* Glover, 16 Cent. L. J. 449	427
Hyatt *v.* James, 2 Bush, 463	214
Hyde *v.* Ruble, 104 U. S. 407	521

SECTION

Hyde *v.* Wabash R. R., Sup. C. Iowa, 1883 337
Hylton *v.* Brown, 1 Wash. C. C. 298 158
Hynes *v.* McDermott, 82 N. Y. 41 275

I.

Illinois Cent. R. R. *v.* Wren, 43 Ill. 77 603
Illinois Co. *v.* Bonner, 75 Ill. 315 610
Ilsley *v.* Merriam, 7 Cush. 342 495
Indiana *v.* Pullman Car Co., 16 Fed. Rep. 193 421
Industrial School Dist. *v.* Whitehead, 2 Beasley, 290 625
Ingersoll *v.* Sergeant, 1 Whart. 337 23
Inman S. S. Co. *v.* Tinker, 94 U. S. 238 430
Insurance Co. *v.* Dunham, 11 Wall. 1 523
v. Francis, 11 Wall. 210 520
v. Morse, 20 Wall. 445 521
v. Pechner, 95 U. S. 183 521
Iron City Bank *v.* Pittsburgh, 37 Penn. St. 340 482
Isham *v.* Iron Co., 19 Vt. 230 625

J.

Jackson's Case, 12 Am. L. Rev. 602 542
Jackson *v.* Catlin, 2 Johns. 248; 8 Johns. 520 471, 598
v. Gilchrist, 15 Johns. 89 64
v. Hammond, 2 Caine's Cases in Error, 337 25
v. Lamphire, 3 Pet. 280 492
v. Reynolds, 14 Johns. 335 434
v. Rose, 2 Va. Cas. 34 524
v. The Magnolia, 20 How. 296 523
v. Twentyman, 2 Pet. 136 520
Jackson Mining Co. *v.* Auditor-General, 32 Mich. 488 408
James *v.* Com., 12 S. & R. 220 23, 580, 624
v. Hutchison, 43 Ala. 721 603
v. Rowland, 52 Md. 462 610
Jecker *v.* Montgomery, 13 How. 498; 18 How. 111 196, 455

SECTION

Jeffreys *v.* Boosey, 4 H. L. C. 815 602
Jenkins, *ex parte*, 2 Am. L. Reg. (O. S.) 144; 2 Wall. Jr. 521 534
Jesson *v.* Wright, 2 Bligh, 55 615
Jessup *v.* Carnegie, 80 N. Y. 441 480
Jett *v.* Com., 18 Gratt. 933 381, 524
Jewell *v.* Weed, 18 Minn. 272 608
J. F. Spencer, The, 3 Ben. 337 523
Johanna Emilie, The, Spink's Prize C. 12 195*b*
John Gilpin, The, Blatchf. Pr. C. 291, 661 233
Johnson *v.* Bentley, 16 Ohio, 97 493
v. Crow, 87 Penn. St. 184 468
v. Falconer, 2 Paine, 601; Van Ness, 1 118, 178, 219
v. Joliet R. R., 23 Ill. 202 613
v. Jones, 44 Ill. 142 536
v. Mackintosh, 8 Wheat. 543 151
v. Parkersburg, 16 W. Va. 402 569
v. People, 83 Ill. 431 621
v. State, 9 Tex. Ap. 249 603
Johnston *v.* Riley, 13 Ga. 197 547
v. Vandyke, 6 McLean, 422 25
Jolly *v.* Bridge Co., 6 McLean, 237 420
Jones *v.* Davis, 6 Neb. 33 492
v. Habersham, 107 U. S. 174 64, 339
v. Leonard, 50 Iowa, 106 542
v. Platt, 60 How. N. Y. Pr. 73 584
v. Richmond, 18 Gratt. 517 576
v. State, 59 Ind. 229 25
v. Tatham, 20 Penn. St. 398 598
v. Walker, 2 Paine, 688 389
v. Williams, 11 M. & W. 176 5
Jones Man. Co. *v.* Com., 69 Penn. St. 137 491
Jonge Klassina, The, 5 Rob. Ad. 297 219
Jonge Margaretha, The, 1 Rob. Ad. 189 326
Jordan, *in re*, 9 Nat. B. R. 180 439
Jordan *v.* Overseers of Dayton, 4 Ohio, 295 450
Joseph, The, 1 Gall. 545 201
Joseph *v.* Randolph, 16 Rep. 227 422
Josephine, The, 3 Wall. 83 233, 534
Journeay *v.* Gibson, 56 Penn. St. 369 567
Julia, The, 8 Cr. 181 218
Juniata, The, Newb. Ad. 352 216

SECTION

Justices' Opinions, 68 Me., 589 262, 432, 506
35 N. H. 579; 52 N. H. 622 603
J. W. French, The, 13 Fed. Rep. 916 527, 566, 581

K.

Kain *v.* Gibbony, 101 U. S. 362 526
Kansas R. R. *v.* Wyandotte, 16 Kan. 587 628
Kaiser *v.* R. R., 18 Fed. Rep. 151 421
Karney *v.* Paisley, 13 Iowa, 89 494
Karrahoo *v.* Adams, 1 Dill. 344 585
Kay *v.* Goodwin, 6 Bing. 582 472
Kearney *v.* Taylor, 15 How. 494 567
Keegan *v.* Geraghty, 101 Ill. 26 299
Kehoe *v.* Kehoe, 21 Am. L. Reg. 656 25
Keith *v.* Clark, 97 U. S. 454 143, 372, 378, 481, 498, 593
Keller *v.* State, 11 Md. 525 603, 620
Kelley *v.* Drury, 9 Allen, 27 440, 495
Kellogg *v.* St. Treasurer, 44 Vt. 356 389
v. Union Co., 12 Conn. 7 427
Kelly *v.* Pittsburgh, 104 U. S. 78 566
Kemp *v.* State, 16 Wis. 359 536
Kennedy *v.* Indianapolis, 103 U. S. 599 569
Kennett *v.* Chambers, 14 How. 38 245
Kent *v.* Somervell, 7 Gill & J. 265 622
Kentucky *v.* Dennison, 24 How. 66 377, 378, 541, 547
Ker, *ex parte*, Sup. Ct. Ind. 1883 352
16 Chic. Leg. News, 17 542
Kerr *v.* Kitchen, 17 Penn. St. 433 567
Kershaw *v.* Kelsey, 100 Mass. 561 214
Keyser *v.* Rice, 47 Md. 203 310, 331
Kinaston *v.* Clarke, 2 Atk. 205 622
Kilbourn *v.* Thompson, 103 U. S. 168 388, 397, 468
Kilgore *v.* Com., 94 Penn. St. 495 623
Kimball's Case, 547
King *v.* Arundel, Hobart, 109 603
v. Banks, 61 Ga. 20 603
Kingsbury's Case, 106 Mass. 223 543
Kingston *v.* Towle, 48 N. H. 57 494
Kinney, *ex parte*, 3 Hughes, 1 587
Kinney's Case, 30 Gratt. 858 587
Kirkland *v.* Hotchkins, 100 U. S. 491 417 *a*
Klein, *in re*, 1 How. 277 440
Klein *v.* Kinkead, 16 Nev. 194 603
Kneass's Est., 31 Penn. St. 87 567
Kneedler *v.* Lane, 45 Penn. St. 238 456
Knox *v.* Bank, 12 Wall. 379 519

SECTION

Koch's Estate, 5 Rawle, 338 473
Kohl *v.* U. S., 91 U. S. 367 573
Koshkonong *v.* Burton, 104 U. S. 668 478, 492, 526
Kring *v.* Missouri, 107 U. S. 221 472, 493

L.

Lafon *v.* Dufrocq, 9 La. An. 350 621
Lake View *v.* Cemetery, 70 Ill. 191 565
Lamar *v.* Browne, 92 U. S. 194 216
Lamb *v.* Schottler, 54 Cal. 319 627
Lamborn *v.* Dickinson Co., 97 U. S. 181 526
Lane, *ex parte*, 6 Fed. Rep. 34 352
Lane County *v.* Oregon, 7 Wall. 71 442, 593
v. Nelson, 79 Penn. St. 407 571, 610
v. Vick, 3 How. 464 526
Langford *v.* U. S., 12 Nott. 338 383
Lange, *ex parte*, 18 Wall. 163 524, 535
Lanz *v.* Randall, 4 Dill. 425 437
Lanzetta's Succession, 9 La. An. 329 621
Lapeyre *v.* U. S., 17 Wall. 191 507, 602
Lapsley *v.* Brashears, 4 Litt. 58; 7 B. Mon. 47 493
Larney's Case, 14 Chic. Leg. News, 206 542
Lawrance *v.* Borm, 86 Penn. St. 225 581
Lea *v.* Bumm, 83 Penn. St. 237 385
Leary's Case, 6 Abb., N. C. 445 547
Leavenworth R. R. *v.* U. S., 92 U. S. 733 383
Lees *v.* Manchester, etc., Canal Co., 11 East, 644 619
v. Sumersgill, 17 Ves., Jr. 508 622
Leffingwell *v.* Warren, 2 Black, 599 388, 389, 526
Legal Tender, The, 1 Wheat. Dig. 302 157
Legal Tender Cases, 12 Wall. 457 442
Legg *v.* Annapolis, 42 Md. 203 603, 606
Le Grand *v.* U. S., 12 Fed. Rep. 577 586
Lehigh Valley R. R. *v.* McFarlan, 31 N. J. Eq. 706 498
Leitsendorfer *v.* Webb, 20 How. 176 154, 212
Le Louis, 2 Dods. 219 181, 609
Leon *v.* Galceran, 11 Wall. 185 523
Leonard *v.* Nav. Co., 84 N. Y. 48 337
v. Wiseman, 31 Md. 201 608

	SECTION
Leroux *v.* Brown, 22 L. J. C. P. 1	609
Les Bois *v.* Bramel, 4 How. 449	568
Lewis *v.* Lewis, 47 Penn. St. 127	493
v. McElvain, 16 Ohio, 347	493
Lexington *v.* McQuillan's Heirs, 9 Dana, 513	588
Library Assn. *v.* Petton, 36 Oh. St. 253	413
License Cases, 5 How. 504	406, 410, 425
License Tax Cases, 5 Wall. 462	606
Little, The, 2 Sprague, 177; 2 [illegible]. 169	216, 219, 250
[illegible]ley *v.* Coats, 1 Ham. 243	25
Lin Sing *v.* Washburn, 20 Cal. 534	421
Little Rock R. R. *v.* Payne, 33 Ark. 816	388, 494
Lippincott *v.* Pana, 92 Ill. 24	526
Live Stock, etc., Assn. *v.* Crescent City Co., 1 Abb. U. S. 398	588
Livingston *v.* Darlington, 101 U. S. 407	404
v. Moore, 7 Pet. 465	526
v. Story, 9 Pet. 632	526
Lloyd *v.* Taylor, 1 Dall. 17	28
Lochnane *v.* Lochnane, 78 Ky. 467	279
Locke's App., 72 Penn. St. 491	601
Loftin *v.* Watson, 32 Ark. 414	603
Lonas *v.* State, 3 Heisk. 287	587
London *v.* Wood, 12 Mod. 669	606
London Packet, The, 1 Mason, 14	218
Long's Appeal, 87 Penn. St. 114	492
Long *v.* Culp, 14 Kan. 412	628
Longlois *v.* Longlois, 48 Ind. 60	623
Lothrop *v.* Stedman, 42 Conn. 583	491, 622
Lottawanna, The, 21 Wall. 558	523
Lord *v.* Chadbourne, 42 Me. 429	472
v. Steamship Co., 102 U. S. 541	420, 421
Loud *v.* Loud, 129 Mass. 14	279
Loughborough *v.* Blake, 5 Wheat. 317	406, 461
Louisiana *v.* Jumel, 107 U. S. 711	493, 532
v. New Orleans, 102 U. S. 203	492, 493
v. New Orleans, S. C. U. S. 1883	588
v. Pilsbury, 105 U. S. 278	493
Louisiana Ins. Co. *v.* Nickerson, 2 Low. 310	584
Louisiana Lottery *v.* Richoux, 23 La. Ann. 743	603
Louisville R. R. *v.* Davidson, 1 Sneed, 637	601
Lowell *v.* Boston, 111 Mass. 454	411
Lowry *v.* Rainwater, 70 Mo. 152	566
Lucas *v.* Tucker, 17 Ind. 41	567
Lucy *v.* Levington, 1 Vent. 175	586
Luehrman *v.* Taxing Dist., 2 Lea, 425	603
Lumsden *v.* Cross, 10 Wis. 282	494
Luther *v.* Borden, 7 How. 1	141, 388, 536, 549, 551, 583
Lyle *v.* Richards, 9 S. & R. 322	36
Lyman *v.* Railroad, 4 Cash. 288	488
Lynch, *ex parte*, 16 S. C. 32	601
Lynch *v.* Clarke, 1 Sandf. Ch. 583	601

M.

Mabry, *ex parte*, 5 Tex. Ap. 93	601
Machine Co. *v.* Gage, 100 U. S. 676	488
Macon R. R. *v.* Goldsmith, 62 Ga. 463	413
Madrese *v.* Willes, 3 B. & S. 353	18
Magdalena Nav. Co. *v.* Martin, 2 El. & El. 94	16
Magellan Pirates, The, 1 Spink. Ad. 81	28
Mager's Succession, 12 Rob. La. 584	36
Maggie Hammond, The, 9 Wall. 435	52
Magill *v.* Brown, 1 Brightly, 346	22, 2
Maissonnaire *v.* Keating, 2 Gall. 325	22
Maize *v.* State, 4 Ind. 342	60
Major Barbour, Blatch. Pr. C. 167	23
Maley *v.* Shattuck, 3 Cr. 458	21
Mallet *v.* Dexter, 1 Curt. 178	52
Malony *v.* City of Milwaukee, 1 Fed. Rep. 611	52
Manley *v.* People, 3 Seld. 295	381, 52
Marbury *v.* Madison, 1 Cranch, 137	389, 504, 513, 518, 59
March *v.* State, 44 Tex. 64	47
Maria, The, 1 Rob. Ad. 340	195
5 Rob. Ad. 365	23
11 Moore, P. C. 271	195
Marianna Flora, The, 11 Wheat. 2	195 *b*, 23
Marian Co. *v.* Winkley, 29 Kan. 36	60
Marlatt *v.* Silk, 11 Pet. 1	52
Marshall *v.* Vicksburg, 15 Wall. 146	43
Martin *v.* Hunter, 1 Wheat. 304	52
v. Mott, 12 Wheat. 19	38, 457, 45
Mary, The, Blatch. Pr. C. 556, 618	23
Mary Clinton, The, Blatch. Pr. C. 556	141, 21
Mason, *ex parte*, 105 U. S. 696	37, 561, 58

SECTION

Mason *v.* Haile, 12 Wheat. 378 493
Maspons *v.* Mildred, 47 L. T. N. S. 318 327
Mather *v.* Nesbit, 13 Fed. Rep. 872 495
Mathews *v.* Tripp, 12 R. I. 256 581
v. Zane, 7 Wheat. 164 682
Mayer, *ex parte*, 50 N. Y. 504 621
Mayor *v.* Harwood, 32 Md. 471 603
Mayor of New York *v.* Furgueson, 23 Hun, 594 422
Maxwell *v.* Goetschins, 40 N. J. L. 383 569
McBlair *v.* Bond, 41 Md. 137 497
McCall *v.* McDowell, 1 Abb. U. S. 212 536
McCampbell *v.* State, 9 Tex. Ap. 124 581
McClain *v.* Easly, 4 Baxt. 520 493
McConnell *v.* Hampton, 12 Johns. 234 579
McConnel *v.* Hector, 3 Bos. & Pul. 113 214, 219
McConnologue, *in re*, 107 Mass. 154 534, 535
McCool *v.* Smith, 1 Black, 459 524
McCoy *v.* Washington County, 3 Wall. Jr. 381 443
McCracken *v.* Hayward, 2 How. 608 493
McCreedy *v.* Com., 27 Gratt. 985 423
McCullough *v.* Maryland, 9 Wh. 316 372, 416
v. State, 11 Ind. 424 603, 611
McDaniel *v.* Correll, 19 Ill. 226 388
McDonnell's Case, 11 Blatch. 79 535
McDonough *v.* Dannery. 3 Dall. 188 197, 223
McDougall *v.* Carpenter, 55 Vt. 336
McElmoyne *v.* Cohen, 13 Pet. 312 492
McElrath *v.* U. S., 102 U. S. 426 581
McEwen *v.* Den, 24 How. 242 610
McGee *v.* Mathis, 4 Wall. 143 479, 481
McGuire *v.* Parker, 32 La. An. 832 422
McHenry *v.* Lewis, 21 Ch. D. 202 349
McKay *v.* Campbell, 2 Sawy. 119 585
McKenna *v.* Fisk, 1 How. 241 25
McKinnon *v.* Bliss, 21 N. Y. 206 598
McKinney *v.* Carroll, 5 B. Mon. 96 493
McLellan *v.* Weston, 599 *a*, 883 492
McNamara *v.* McNamara, 62 Ga. 200 340
McPeck *v.* Moore, 51 Vt. 269 584
Medway *v.* Needham, 16 Mass. 157 275
Mellen *v.* Mellen, 10 Abb. N. C. 329 278

SECTION

Memphis *v.* U. S., 97 U. S. 293 492
Memphis Co. *v.* Nolan, 14 Fed. Rep. 532 588
Mentor, The, 1 Rob. Ad. 170 158, 195 *b*
Mersey, The, Bl. Pr. Ca. 187 389
Merryman, *ex parte*, Taney, 246 536
Meshmeier *v.* State, 11 Ind. 482 601
Messenger *v.* Mason, 10 Wall. 507 519
Metcalf *v.* Williams, 104 U. S. 93 581
Methodist Church *v.* Remington, 1 Watts, 218 23, 25
Metropolitan Board *v.* Barrie, 34 N. Y. 666 425, 486
Metzger, *in re*, 1 Barb. 248 506, 518
Mew, *in re*, 31 L. J. By. 87 612
Meyer *v.* Muscatine, 1 Wall. 384 526
Middletown, *in re*, 82 N. Y. 196 385, 603, 621
Miles, *in re*, 52 Vt. 609 544
Miller *v.* Goodwin, 70 Ill. 659 603
v. N. Y., 29 Alb. L. J. 30 420
v. Salomons, 21 L. J. Ex. 161 615
v. State, 3 Oh. St. 475 603, 621
v. U. S., 11 Wall. 268 455
Milligan, *ex parte*, 4 Wall. 2 38, 212, 222, 380, 455, 459, 503, 566, 579
Milligan *v.* Hovey, 3 Biss. 13 459, 502, 536
Mills *v.* Duryea, 7 Cranch, 481 538
v. Martin, 19 Johnson, 7 38
v. Wilson, 88 Penn. St. 118 317
Milwaukee Supervisors *v.* Pabst, 45 Wis. 311 569
Miners' Bank *v.* Iowa, 12 How. 1 465, 519
Minor *v.* Happersett, 21 Wall. 162 262, 432
Mississippi *v.* Johnson, 4 Wall. 475 389, 513, 593
Missouri *v.* Lewis, 101 U. S. 22 586, 588
Mitchell *v.* Burlington, 4 Wall. 270 526
v. Harmony, 13 Howard, 115 216, 576
Mobile Co. *v.* Kimball, 102 U. S. 691 421, 423, 424, 569, 574
Moers *v.* City of Reading, 21 Penn. St. 188 613
Montclair *v.* Ramsdell, 107 U. S. 147 603
Montello, The, 20 Wall. 430 429
Moodie *v.* The Betty, 3 Dall. 288 (note) 201
Moody *v.* State, 48 Ala. 115 603
Moore, *ex parte*, 62 Ala. 474 603
Moore *v.* Hegeman, 92 N. Y. 521 274
v. Holland, 16 S. C. 15 493
v. Illinois, 14 How. 13 524

SECTION

Moore *v.* McMillan, 54 Vt. 27 495
v. Quick, 105 Mass. 49 409
v. State, 42 N. J. L. 208 472
v. Transportation Co., 24 How. 1 428
Morewood *v.* Enequist, 23 How. 491 523
Morgan *v.* King, 30 Barb. 14 22
v. Louisiana, 93 U. S. 917 413
v. Plank Road, 2 Dutch. 99 601
Morris *v.* Canal Co., 4 W. & S. 461 625
v. Smith, 1 Yeates, 238 23
v. Vanderen, 1 Dall. 64 23, 25
Morse *v.* Goold, 1 Kern, 281 492
Morton *v.* Comptroller-Gen., 4 S. C. 430 603
v. Skinner, 48 Ind. 123 541
Moses Taylor, The, 4 Wall. 411 522, 523
Mott *v.* R. R., 30 Penn. St. 9 482
Moxon *v.* The Fanny, 2 Pet. Ad. 309 197
Mullee, *in re*, 7 Blatch. 23 508
Mulligan *v.* Smith, 8 Pac. Coast L. J. 499 588
Mulroy *v.* Churchman, 52 Iowa, 328 413
Munn *v.* Illinois, 94 U. S. 113 422, 488, 570
Munro *v.* Butt, 8 E. & B. 738 615
Murch *v.* Turner, 21 Me. 535 434
Murphy, *in re*, 1 Woolw. 141 472, 473
Murphy's Test Case, 41 Mo. 339 472
Murphy *v.* Manning, 134 Mass. 488 495
Murray *v.* Charleston, 96 U. S. 432 432, 491, 493
v. Charming Betsy, 2 Cr. 64 609
v. Lardner, 2 Wall. 110 603
Myrick *v.* Hasey, 27 Me. 9 613

N.

Nabob of Carnatic *v.* East India Co., 1 Vesey, Jr. 371; 2 id. 56 593
National Bank *v.* U. S., 101 U. S. 1 405
v. Yankton, 101 U. S. 129 464
National Bank of Chester *v.* Chester, 14 Fed. Rep. 239 603
Nayade, The, 1 Newb. Ad. 366 234
Naylor *v.* Hoffman, 22 How. Pr. 510 170
v. Taylor, 9 B. & C. 718 233
Nazro *v.* Ins. Co., 14 Wis. 295 621

SECTION

Neal *v.* Delaware, 103 U. S. 370 521, 586
Neely *v.* State, 4 Baxt. 174 581
Negro Case, 20 How. St. Tr. 82 182
Neilson *v.* Garza, 2 Woods, 287 408
Neptunus, The, 2 Rob. Ad. 110; 6 Rob. Ad. 403 234
3 Rob. Ad. 173 226, 234, 235
Nereide, The, 9 Cr. 388 195 *b*, 218
Nesmith *v.* Sheldon, 7 How. 812 526
Neustra Senora, The, 4 Wheat. 52 141
New Hampshire *v.* Louisiana, S. C. U. S. 1883 532
New Jersey Line Co. *v.* Trotter, U. S. C. C. N. J. 1883 521
New Orleans *v.* Asylum, 31 La. An. 292 491
v. Davidson, 30 La. An. 541 413
New Orleans Water Works *v.* St. Tammany, 14 Fed. Rep. 194 565
New York *v.* Connecticut, 4 Dall. 1 593
v. Lord, 18 Wend. 126 576
v. Miln, 11 Peters, 102 425
New York R. R. *v.* Kip, 46 N. Y. 546 609
v. Vanhern, 57 N. Y. 473 606
Newark Savings Inst. *v.* Forman, 33 N. J. Eq. 436 493
Newland *v.* Marsh, 19 Ill. 376 608
Nichols *v.* Levy, 5 Wall. 433 526
Noblom *v.* Milborne, 21 La. An. 641 214
Norman *v.* Heist, 5 W. & S. 171 571
Norris *v.* Thompson, 19 N. J. Eq. 307 25
North Bennington Bank *v.* Bennington, 16 Blatch. 53 526
North Carolina R. R. *v.* County, 82 N. C. 259 404
Northern *v.* Barnes, 2 Lea, 603 388
Northwest Ins. Co. *v.* Elliott, 7 Sawy. 17 319
Norway Plains Co. *v.* R. R., 1 Gray 263 30
Norwegian Street, *in re*, 81 Penn. St. 349 600
Noyes, *in re*, 17 Alb. L. J. 407 546
Nunes *v.* Wellisch, 12 Bush, 363 616

O.

Oachita Packet Co. *v.* Aiken, 16 Fed. Rep. 890 430
Oakland *v.* Rier, 52 Cal. 270 569
Oates *v.* Bank, 100 U. S. 239 526
Oddy *v.* Borill, 2 East, 475 196

SECTION

O'Flaherty *v.* McDowell, 6 H. L. C. 142 630
Ogden *v.* Barber, 18 Johns. 87 218
v. Blackledge, 2 Cr. 272 610
v. Saunders, 12 Wheat. 213 493, 495, 606
O'Hanlon *v.* Myers, 10 Rich. 128 624
Old South Society *v.* Boston, 127 Mass. 378 413
Oler, The, 14 Am. Law Reg. 300 523
Olery *v.* Brown, 51 How. Pr. 92 546
Oleson *v.* Green Bay R. R., 36 Wis. 383 623
Oliver Jordan, The, 2 Curt. C. C. 414 527
O'Mealy *v.* Wilson, 1 Camp. 482 214
One Hundred and Thirty-Eighth Street, *in re*, 60 How. (N. Y.) Pr. 290 603
One Hundred and Three Casks of Rice, Blatch. P. C. 211 197
Orazembo, The, 6 Rob. Ad. 259 228
Oregon Co. *v.* Rathbun, 5 Sawy. 32 317, 603
Orr Ewing, *in re*, 21 Ch. D. 456 338
Orton *v.* Smith, 18 How. 263 527
Orvis *v.* Powell, 98 U. S. 176 526
Osage Valley R. R. *v.* Morgan Co., 53 Mo. 156 481
Osborn *v.* Bank, 9 Wheat. 738 409, 532
v. U. S., 91 U. S. 474 509
Osburn *v.* Staley, 5 W.Va. 85 389, 603
Ostsee, The, 9 Moore P. C. 150 158, 195 *b*
Overing *v.* Foote, 65 N. Y. 263 566, 588
Owan *v.* State, 31 Ala. 387 557
Owen *v.* State, 38 Ark. 512 579

P.

Pace *v.* State, 106 U. S. 583; 69 Ala. 331 587
Pacific Coast S. S. Co. *v.* Board of R. R. Com., 18 Fed. Rep. 10 420
Pacific Ins. Co. *v.* Soule, 7 Wall. 433 407
Pacific R. R. *v.* Gov., 23 Mo. 353 603
Pack *v.* Barton, 47 Mich. 520 603
Packer *v.* R. R. 19 Penn. St. 211 619
Packet Co. *v.* Catletsburg, 105 U. S. 559 430
v. Keokuk, 95 U. S. 80 430
v. St. Louis, 95 U. S. 80; 100 U. S. 423 430
Palairet's Appeal, 67 Penn. St. 479 477
Palmer *v.* Commissioners, 3 McLean, 226 427
Palmyra, The, 12 Wheat. 1 200
Pana *v.* Bowler, 107 U. S. 529 480, 526
Panaghia Rhomba, The, 12 Moore's P. C. 168 235
Pargond's Case, 13 Wall. 156 507
Parkinson *v.* State, 14 Md. 184 621
Parlement Belge, The, L. R. 4 P. D. 129; 5 P. D. 197 190
Parlin *v.* U. S. 1 N. & H. 174 219
Parker *v.* Com. 6 Barr, 507 601
v. Hubbard, 64 Ala. 203 623
v. Overman, 18 How. 137 412
v. U. S., 1 Pet. 293 504
Parmelee *v.* Lawrence, 48 Ill. 331 568
Parrott's Chinese Case, 6 Sawy. 349 586, 588, 594
Parrott *v.* Kumpf, 102 Ill. 423 492
Passenger Cases, 7 How. 283 408, 410, 421, 422
Pate *v.* Pate, 6 Mo. Ap. 49 279
Patten *v.* Green, 13 Cal. 325 588
Patterson *v.* Com., 11 Bush, 311; 21 Am. Rep. 220
v. Kentucky, 97 U. S. 501 450
v. Winn, 5 Pet. 233 25
Peapatch Case, 1 Wal. Jr., App. ix. 23
Pearson *v.* Portland, 69 Me. 278 588
Peck *v.* San Antonio, 51 Tex. 490 603
v. Weddell, 17 Oh. St. 271 601
Peete *v.* Morgan, 19 Wall. 581 430
Pelham *v.* Messenger, 16 La. An. 99 609
Pelzer *v.* Campbell, 8 Mass. 423 492
Peik *v.* Railroad, 94 U. S. 164 489, 526
Penn *v.* Lord Baltimore, 1 Vesey, 446 593
Penniman, *in re*, 103 U. S. 714 492
Pennoyer *v.* Neff, 95 U. S. 714 539
Pennsylvania *v.* Bridge Co., 18 How. 421 420
v. Wheeling Bridge Co., 13 How. 519 420
Pennsylvania R. R. *v.* National R. R., 23 N. J. Eq. 441 603
v. Riblet, 66 Penn. St. 164 621
Penrose *v.* Canal Co., 56 Penn. St. 46 493
Penruddock's Case, 5 Rep. 100 5
Pensacola Tel. Co. *v.* Western Tel. Co., 96 U. S. 1 19, 422, 446
People *v.* Baker, 76 N. Y. 78 278
v. Banks, 67 N. Y. 568 621
v. Board of Education, 101 Ill. 308 586

	SECTION
People v. Board of Education, 18 Mich. 400	586
v. Boston R. R., 70 N. Y. 569	488, 489
v. Brady, 56 N. Y. 182	541, 543
v. Briggs, 50 N. Y. 553	608, 621
v. Brooklyn, 18 Hun, 386	413
v. Brooklyn R. R., 89 N. Y. 75	475
v. Burt, 43 Cal. 560	603
v. Catholic Protectory, 61 How. N. Y. Pr. 445	584
v. Clark, 23 Hun (N. Y.), 374	581
v. Collins, 3 Mich. 343	601
v. Commissioners of Marlborough, 54 N. Y. 276	603
v. Compagnie Générale, 107 U. S. 59	421, 621
v. Devlin, 33 N. Y. 269	603
v. De Wolf, 62 Ill. 253	603
v. Easton, 13 Abb. (N. S.) 159	586
v. Edmonds, 15 Barb. 529	608
v. Gallagher, 28 Alb. L. J. 471	586
v. Godfrey, 17 Johns. 225	461
v. Gerke, 5 Cal. 381	383
v. Graceland Co., 86 Ill. 336	413
v. Hoffman, 97 Ill. 234	614
v. Justices, 74 N. Y. 406	579
v. Kelly, 38 Cal. 145	524
v. Lawrence, 41 N. Y. 123	621
v. Loewenthal, 93 Ill. 191	606
v. Lord, 12 Hun, 282	472
v. Lynch, 11 Johns. 549	524
v. Lyon, 27 Hun, 180	474
v. Mahaney, 13 Mich. 481	603
v. Manhattan Co., 9 Wend. 351	481
v. Morris, 13 Wend. 325	485
v. Nally, 49 Cal. 478	601
v. Pacific Co., 8 Sawy. 640; 16 Fed. Rep. 344	421
v. Pinckney, 32 N. Y. 377	485
v. Pinkerton, 77 N. Y. 245	547
v. Purdy, 2 Hill, 31; 4 Hill, 384	603
v. Reynolds, 5 Gilm. 1	601
v. Rochester, 50 N. Y 525	608
v. Salomon, 46 Ill. 333; 51 Ill. 38	601
v. Shepard, 36 N. Y. 285	611
v. Starne, 35 Ill. 121	603
v. Stevens, 13 Wend. 341	620
v. Supervisors of Chenango, 8 N. Y. 317	603
People v. Supervisors of N. Y., 16 N. Y. 424	600
v. Sweetman, 3 Parker C. C. 358	524
v. Turner, 55 Ill. 280	584
v. Tweed, 63 N. Y. 202	584
v. Weaver, 100 U. S. 539	409, 588
v. Webb, 16 Hun, 42	566
v. Williams, 8 Cal. 97	609
v. Wintermute, 1 Dak. Ter. 63	627
People's Ins. Co. v. Hartshorne, 84 Penn. St. 453	619
Perrine v. Canal Co., 9 How. 172	619
Perry v. Com., 3 Gratt. 632	473
v. Skinner, 2 M. & W. 471	615
Perry Co. v. Selma R. R., 58 Ala. 546	603
Peruvian Guano Co. v. Buckwoldt, 23 Ch. D. 225	349
Pervear v. Com. 5 Wall. 475	580
Peshall v. Layton, 2 T. R. 712	615
Peterhoff, The, 5 Wall. 28; Bl. Pr. C. 463	226, 233, 250
Peters v. The Auditor, 33 Gratt. 368	610
Petition of Fifty Tax Payers, 25 Pitts. L. J. 146	601
Pettiford v. Zoellner, 45 Mich. 358	283
Petty, *in re*, 22 Kas. 477	472
Phalen v. Virginia, 8 How. 163	486, 487, 526
Philadelphia v. Scott, 81 Penn. St. 80	576
v. Miller, 49 Penn. St. 440	566, 588
Phila. Pass. R. R. v. Union R. R., 9 Phila. 495	603
Phillips v. Hatch, 1 Dill. 571	214
v. Poland, L. R. 1 C. P. 204	615
Pierce v. Carskadon, 16 Wall. 234	471
v. New Hampshire, 5 How. 504	425
Pierson v. Freeman, 77 N. Y. 589	584
v. Lane, Sup. Ct. Iowa, 1883	25
Pike v. Wassell, 94 U. S. 711	467
Pim v. Nicholson, 6 Oh. St. 176	603
Pingree v. Snell, 42 Me. 53	625
Pinkham v. Dorothy, 55 Me. 135	609
Pioneer, The, Bl. Pr. C. 2, 22	219
Piot, *ex parte*, 48 L. T., N. S. 120	355
Pirate v. Dalby, 1 Dall. 179	20
Pittsburgh R. R. v. South W. R. R., 77 Penn. St. 173	619
Pizarro, The, 10 N. Y. Leg. Ob. 97; 2 Wheat. 227	100, 195 b
Plank Road Co. v. Spear, 22 Penn. St. 376	603

SECTION

Planters' Bank v. Sharp, 6 How. 301 481
v. Union Bank, 16 Wall. 483 201
Poage v. State, 3 Ohio St. 229 561
Poe v. Duck, 5 Md. 1 495
Poland, *in re*, L. R. 1 Ch. App. 356 615
Pollard v. Hagan, 3 How. 212 25
v. Shaaffer, 1 Dall. 210 113
Polly, The, 2 Rob. Ad. 361 233
Ponge, *in re*, 17 Cent. L. J. 310 383, 435
Pooley v. Wetham, 15 Ch. D. 435 357
Portland, The, 3 Rob. Ad. 41 219
Portland v. Bangor, 65 Me. 120 588
Portland R. R. v. Boston R. R., 65 Me. 122 489
Post, *in re*, 13 R. I. 495 567
Post Nati, Case of the, 15 Bacon's Works, 200 21, 63, 86
Pound v. Turck, 95 U. S. 459 420
Poulter's Co. v. Phillips, 6 Bingh. N. C. 314 615
Powers v. Bergen, 2 Seld. 358 608
Prescott v. Canal Co., 19 Ill. 324 603
President, The, 5 Rob. Ad. 248 219
Price v. Mace, 47 Wis. 23 340
Priestman v. U. S., 4 Dall. 28 605
Prigg v. Pennsylvania, 16 Pet. 539 381, 524
Prince Leopold, The, Blatch. Pr. C. 89, 647 219
Pritchard v. Norton, Sup. Ct. U. S. 1883 316
Prize Cases, 2 Black, 635 141, 233, 454, 455
Protector, The, 12 Wall. 700 389
Providence Bank v. Billings, 4 Pet. 514 413, 619
Provident Inst. v. Massachusetts, 6 Wall. 611 526
Public School v. Trenton, 30 N. J. Eq. 667 623, 627
Pumpelly v. Green Bay Co., 13 Wall. 166 570
Putnam v. Longley, 11 Pick. 487 608

Q.

Queen v. Durham, 10 Mod. 146 600
Quimby v. Hazen, 54 Vt. 132 566
Quong Woo, *in re*, 26 Alb. L. J. 152 588

R.

R. v. Athos, 8 Mod. 135 622
v. Button, 11 Q. B. 929 617
v. Capel, 12 A. & E. 382 611

SECTION

R. v. Davis, 8 Mod. 54 561
Say. 163 620
v. Foote, 48 L. T. N. S. 733 22
v. Ganz, 46 L. T. N. S. 592 355
v. Gregory, 2 N. & M. 478 620
v. Hodnett, 1 T. R. 96 612
v. Ipswich, 2 Q. B. D. 269 610
v. Justices of Leicester, 7 B. & C. 6; 9 D. & R. 772 600
v. Keyn, L. R. 2 Ex. Div. 63 12, 123, 186
v. Loxdale, 1 Barr, 445 600
v. Marks, 3 East, 157 622
v. Mazean, 9 C. & P. 676 617
v. Mill, 10 C. B. 379 615
v. Monck, L. R. 2 Q. B. D. 544 630
v. Morris, L. R. 1 C. C. 90 615
v. Most, 7 Q. B. D. 244 138
v. Peltier, 28 St. Tr. 530 138
v. Pembridge, 3 Q. B. 901 612
v. Phillips, L. R. 1 Q. B. 648 615
v. Robinson, 2 Burr. 799 620
v. Sainsbury, 4 T. R. 451 620
v. Serva, 1 Den. C. C. 104 181
v. Shiles, 1 Q. B. 919 615
v. Skeen, 28 L. J. M. C. 91; Bell, 97 615, 630
v. Threlkeld, 4 B. & A. 229 629
v. Warwickshire, 6 E. & B. 837 609
v. Weil, 47 L. T. N. S. 630 355
v. Whitaker, 2 C. & K. 636 611
v. Wigg, 2 Salk. 460 620
v. Wright, 1 Burr. 543 620
v. Zulueta, 1 C. & K. 215 612
Radcliff v. Ins. Co., 7 Johns. 38 233, 234
Rader v. Township, 39 N. J. L. 509 603
Railroad Co. v. Alabama, 101 U. S 382 486, 492
v. Bank, 102 U. S. 14 526
v. Brown, 17 Wall. 445 586
v. Commissioners, 103 U. S. 1 413
v. Commissioners, 35 Ohio St. 1 492
v. Fuller, 17 Wall. 560 420, 421
v. Gaines, 97 U. S. 697 413, 482, 526, 603
v. Georgia, 98 U. S. 359 382, 482, 491, 526
v. Hecht, 95 U. S. 168 492
v. Husen, 95 U. S. 465 423, 424
v. National Bank, 102 U. S. 14 603

	SECTION
Railroad Co. *v.* Peniston, 18 Wall. 5	409
v. Pollard, 22 Wall. 341	526
v. Tennessee, 101 U. S. 337	486, 492
Railroad Tax Cases, 13 Fed. Rep. 736	409, 421, 588, 594
Railway Co. *v.* Loftin, 98 U. S. 559	413
v. Philadelphia, 101 U. S. 528	491
v. Ramsey, 22 Wall. 322	520
v. Renwick, 102 U.S. 180	420
v. Whitton, 13 Wall. 270	521
Rand *v.* Com., 9 Gratt. 738	472
Randall *v.* Brigham, 7 Wall. 523	526
Randolph, *ex parte*, 2 Brock. 447	606
Ranger, The, 6 Rob. Ad. 125	227
Ratcliffe *v.* Anderson, 31 Grat. 105	388, 492
Ratzky *v.* People, 29 N. Y. 124	472
Read *v.* Plattsmouth, 107 U. S. 568	493, 603
Reading R. R. *v.* Penns., 15 Wall. 232; 62 Penn. St. 286	421, 422
Red *v.* Johnson, 53 Tex. 284	413
Redemptorist Fathers *v.* Boston, 129 Mass. 178	413
Redman *v.* R. R., 33 N. J. Eq. 165	577
Reformed Church *v.* Schoolcraft, 65 N. Y. 134	492
Regents *v.* Williams, 9 Gill & J. 365	618
Reis *v.* Graff, 51 Cal. 86	610
Reiser *v.* Wm. Tell Asso., 39 Penn. St. 137	600
Resolution, The, 2 Dall. 4	223
Resp. *v.* Dennie, 4 Yeates, 270	555
v. Devore, 1 Yeates, 501	23
v. Keppele, 2 Dall. 179; 1 Yeates, 233	20
v. Longchamps, 1 Dall. 111	119
v. Mesca, 1 Dall. 73	23
Rever, The, 2 Sprague, 107	455
Reynolds, *ex parte*, 18 Alb. L. J. 8	585
Reynolds *v.* People, 1 Cal. 179	462
v. U.S., 98 U.S. 145	464, 465
Rhode Island *v.* Massachusetts, 12 Pet. 657	530, 593
Ribon *v.* R. R., 16 Wall. 446	521
Rice *v.* Foster, 4 Harr. (Del.) 479	601
v. Parkman, 16 Mass. 326	567
v. Railroad, 1 Black, 360	524
v. Shook, 27 Ark. 137	214
v. Chicago, 59 Ill. 286	578
Rich *v.* Flanders, 39 N. H. 323	494, 567
Richardson, *in re*, 2 Story, 571	602
Richardson *v.* Akin, 87 Ill. 138	492
v. Emswiler, 14 La. Ann. 658	609
v. Ins. Co., 6 Mass. 113	246
Richeson *v.* Simmons, 47 Mo. 20	388
Richmond *v.* Copper Co., 2 Low. 315	523
Richmond R. R. *v.* Louisa R. R., 13 How. 71	575
Richter *v.* Cummings, 60 Penn.St. 441	474
Riley's Case, 2 Pick. 172	472
Rindskopf *v.* De Ruyter, 39 Mich. 1	319
Rison *v.* Farr, 24 Ark. 161	472
Robert Fulton, The, 1 Paine C. C. 620	527
Roberts *v.* Bolles, 101 U. S. 120	526
v. Boston, 5 Cush. 198	586
v. Cocke, 28 Gratt. 207	477
v. Prosser, 53 N. Y. 260	584
Robertson *v.* Cease, 97 U. S. 646	520
Robinson, *ex parte*, 6 McLean, 355	527, 534, 535
Robinson *v.* Bidwell, 22 Cal. 379	601
v. Campbell, 3 Wheat. 212	526
v. Collingwood, 17 C. B. (N. S.) 777	622
v. Howe, 13 Wis. 341	493
v. Richardson, 13 Gray, 454	560
Rockport *v.* Walden, 54 N. H. 167	492
Rogers *v.* Quinney, 51 Wis. 62	265
Romaine, *in re*, 23 Cal. 585	547
Romp *v.* Com., 30 Penn. St. 475	381
Rood *v.* McCargar, 49 Cal. 117	385
Ropes *v.* Clinch, 8 Blatch. C. C. 304	383
Rose *v.* Himely, 4 Cranch, 241	187, 455, 606
Ross, *ex parte*, 2 Bond, 252	544
Rosseter *v.* Calhmann, 8 Ex. 361	606
Roth *v.* Ehman, 107 U. S. 319	496, 526
v. Roth, 104 Ill. 35	282
Rounds *v.* Waymart, 81 Penn. St. 395	623
Routledge *v.* Low, L. R. 3 H. L. 100	609
Routsong *v.* Wolf, 35 Mo. 174	568
Rowan *v.* Runnells, 5 How. 134	526
Royal Bank *v.* Com. Bank, 47 L. T. N. S. 360	324
Ruggles *v.* Illinois, S. C. U. S. 1883	489
Rule of Court, *in re*, 3 Woods, 502	560
Rung *v.* Shoneberger, 2 Watts, 23	5
Rump *v.* Com., 30 Penn. St. 475	524
Russell *v.* Madden, 95 Ill. 485	339

SECTION

Russell *v.* Mayor, 2 Denio, 461 576
v. Southard, 12 How. 139 526
Rutherford *v.* Maynes, 97 Penn. St. 78 566, 615, 619
Ryan *v.* Lynch, 68 Ill. 160 603
v. State, 5 Neb. 276 628
v. Thomas, 4 Wall. 603 519

S.

Sackett *v.* Andross, 5 Hill. 327 440
Sackett, etc., Streets, 74 N. Y. 95 603
Sage *v.* Brooklyn, 89 N. Y. 36 569, 578
Sahlinger *v.* People, 102 Ill. 241
Salkeld *v.* Johnston, 1 Howe, 196 622
Sally Magee, The, 3 Wall. 451; Blatch. Pr. C. 382 219, 220
Salt Co. *v.* East Saginaw, 13 Wall. 373 492
Saltpetre Case, 12 Rep. 12 576
Salzenstein *v.* Mairs, 91 Ill. 391 421
San Antonio *v.* Jones, 28 Tex. 19 601
San Jose Indians, The, 2 Gall. 265; 1 Mason, 38 219
Santa Clara *v.* R. R., 18 Fed. Rep. 385 409, 491, 588, 603
Santa Cruz, The, 1 Rob. Ad. 50 224
Santissima Trinidad, The, 7 Wheat. 283 190, 241, 249, 250
Sarah Starr, The, Bl. Pr. C. 69 216, 219, 233, 455
Satterlee *v.* Mathewson, 16 S. & R. 169; 2 Pet. 380 493, 567
Savage *v.* Walshe, 26 Ala. 619 600
Savings Bank *v.* Allen, 28 Conn. 97 493, 567, 568, 600
Scanlan *v.* Childs, 33 Wis. 663 613
Scheftels *v.* Tabert, 46 Wis. 439 616
Schenley *v.* Com., 36 Penn. St. 29 567
Scholefield *v.* Eichelberger, 7 Pet. 586 214
Schoone Sophie, The, 6 Rob. Ad. 138 157, 223
Schoonmaker *v.* Gilmore, 102 U. S. 118 420
Schwartz *v.* Ins. Co., 3 Wash. C. C. 117 218
Scott *v.* Clark Co., 34 Ark. 283 603
v. Duffy, 14 Penn. St. 18 318
v. Legg, L. R. 2 Ex. D. 39 630
v. Young America, Newb. Ad. 101 523
Scribner *v.* Fisher, 2 Gray, 43 440
Secombe *v.* R. R., 23 Wall. 108 577
Second Nat. Bank *v.* Caldwell, 13 Fed. Rep. 429 409
v. Curren, 36 Iowa, 555 331

SECTION

Secretary *v.* McGarrahan, 9 Wall. 298 513
Seidenbender *v.* Charles, 4 S. & R. 151 622
Seip *v.* Storch, 52 Penn. St. 210 474
Semmes *v.* Ins. Co., 36 Conn. 543; 13 Wall. 158 214
Seven Hickory *v.* Ellery, 103 U. S. 423 603
Seybert *v.* Pittsburgh, 1 Wall. 272 526
Seymour's Case, 6 Am. Jur. 226 547
Seymour *v.* Bailey, 66 Ill. 288 214
Shattuck *v.* Ins. Co., 4 Clift. 598 317
Shaw *v.* R. R., 101 U. S. 557 603
Shelby *v.* Guy, 11 Wheat. 361 526
Shelton *v.* Tiffin, 6 How. 163 520
Shepherd *v.* People, 25 N. Y. 406 472
Sherlock *v.* Alling, 93 U. S. 99 425
Sherman *v.* Story, 30 Cal. 253 603
Shewell *v.* Fell, 3 Yeates, 17 23
Shields *v.* Barrow, 17 How. 130 521
v. Ohio, 95 U. S. 319 489, 491
Shonk *v.* Brown, 61 Penn. St. 320 568
Shortrede *v.* Cheek, 1 A. & E. 57 612
Siebold, *ex parte*, 100 U. S. 371 395, 468
Sifford, *ex parte*, 5 Am. L. Reg. (O. S.) 659 534
Sill *v.* Corning, 15 N. Y. 297 608
Silliman *v.* Bridge Co., 4 Blatch. 74, 395 420
Simonds *v.* Simonds, 103 Mass. 572 388
Sims *v.* Hundley, 6 How. 1 526
Sinking Fund Cases, 99 U. S. 700 488, 491, 565
Sinks *v.* Reese, 19 Oh. St. 306 437
Sinnot *v.* Davenport, 22 How. 227 420
Siren, The, 7 Wall. 152 196
Sir William Peel, The, 5 Wall. 517 196, 239
Six Hundred and Eighty Pieces of Merchandise, 2 Spr. 233 197
Sixth Ave. R. R. *v.* Kerr, 72 N. Y. 330 574
Sizemore *v.* State, 3 Head, 26 524
Slack *v.* Jacob, 8 W. Va. 612 606
Slade *v.* Joseph, 5 Daly, 187 546
Slaughter House Case, 9 Fed. Rep. 743 565
Slaughter House Cases, 16 Wall. 36 376, 425, 437, 565, 585, 586, 588
Smith, *ex parte*, 94 U. S. 455 520
3 McLean, 121 542, 543
Smith, *in re*, 2 Woods, 458 439
8 Nat. B. R. 401 439
Smith *v.* Directors, 40 Iowa, 518 586
v. Janesville, 26 Mo. 291 601

SECTION

Smith *v.* Maryland, 18 How. 71 423
v. McCarthy, 56 Penn. St. 359 601
v. Osborn, 53 Iowa, 474 413
v. Shaw, 12 Johns. 257 579
v. State, 12 Oh. St. 466 25
v. The Creole, 2 Wall. 485 620
v. Tilley, 1 Keb. 712 613
Smithee *v.* Garth, 33 Ark. 17 603, 606
Smoot *v.* R. R., 13 Fed. Rep. 337 586
Smyth *v.* Balch, 40 N. H. 363 494
Snoddy *v.* Howard, 51 Ind. 569 524
Snook *v.* Snetzer, 25 Oh. St. 517 331
Snyder, *ex parte*, 64 Mo. 58 543
Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464 161
Sohier *v.* Mass. Hospital, 3 Cush. 483 567
Sohn *v.* Waterson, 17 Wall. 596 492
Solomon *v.* Commissioners, 41 Ga. 157 613
Sommersett's Case, 20 St. Tr. 1 20
Sonoma County Tax Case, 13 Fed. Rep. 789 588
South Carolina *v.* Gailliard, 101 U. S. 433 492
South Ottawa *v.* Perkins, 94 U. S. 260 603
South Park Co. *v.* Dunlevy, 91 Ill. 49 578
Southwark Bank *v.* Com., 26 Penn. St. 446 603
Spangler *v.* Jacoby, 14 Ill. 297 603
v. Com., 16 S. & R. 70 23
Specht *v.* Com., 8 Barr, 312 553
Speed *v.* Kelley, 59 Miss. 47 337
Sperry *v.* Ins. Co., 2 Wash. C. C. 243 233
Spes, The, 5 Rob. Ad. 72 233, 234
Spiller *v.* Woburn 12 Allen, 127 553
Sprague *v.* Hoyt, 103 U. S. 613 295
Springbok, The, 5 Wall. 1; Blatch. Pr. C. 380, 434 226, 233
Springer *v.* Foster, 2 Story, 383 586
v. U. S. 102 U. S. 586 407, 566
Spring Valley Waterworks *v.* Bartlett, 16 Fed. Rep. 615 489
Sprott *v.* Reid, 3 Greene (Iowa), 489 493
Staadt Embden, The, 1 Rob. Ad. 26 227
Stanley *v.* Stanley, 26 Me. 191 491
Starin *v.* Genoa, 23 N. Y. 439 601
State *v.* Ah Chew, 16 Nev. 50 425, 435, 585
v. Ah Sam, 15 Nev. 27 425, 603
v. Allen, 2 Humph. 258 545
v. Allen, 2 McCord, 55 385
v. Anderson, 40 N. J. L. 224 566
v. Antonio, 3 Brev. 562 524

SECTION

State *v.* Arlin, 39 N. H. 179 473
v. Armington, 25 Minn. 29 279
v. Axtell, 41 N. J. L. 117 413
v. Beswick, 13 R. I. 211 474
v. Billis, 2 McCord, 12 443
v. Boogher, 71 Mo. 631 620
v. Brewster, 7 Vt. 118 544
v. Brewster, 42 N. J. L. 125 611, 614
v. Brown, 2 Oreg. 221 524
v. Buchanan, 5 Har. & J. 500 524
v. Buckley, 40 Conn. 246 565
v. Buzine, 4 Harr. 572 547
v. Carew, 13 Rich. L. 498 493
v. Cate, 58 N. H. 43 565
v. Chambers, 70 Mo. 625 603
v. Chase, 5 Oh. St. 528 609
v. City of Newark, 34 N. J. L. 236 603
v. Clarke, 54 Mo. 17 385
v. Clayton, 41 Tex. 410 557
v. Conkling, 19 Cal. 501 625
v. Corson, 59 Me. 137 472, 473
v. Covington, 29 Oh. St. 102 603, 621
v. Crawford, 35 Ark. 327 603
v. Doherty, 60 Me. 504 388, 473
v. Duffy, 7 Nev. 342 586
v. Elwood, 11 Wisc. 17 601
v. Ferguson, 62 Mo. 77 610
v. Field, 17 Mo. 529 601
v. Fletcher, 5 N. H. 257 620
v. Foote, 83 N. C. 102 584
v. Fox, 51 Md. 412 603
v. Francis, 26 Kan. 724 603
v. Glenn, West Coast Rep. No. 1 603, 613
v. Greene Co., 54 Mo. 540 481
v. Hammer, 42 N. J. L. 435 621
v. Haney, 67 N. C. 467 507
v. Hays, 49 Mo. 604 611
v. Henderson, 32 La. An. 779 603
v. Hopper, 71 Mo. 425 388
v. Ingersoll, 17 Wis. 631 629
v. Jaeger, 63 Mo. 403 618
v. Jersey City, 40 N. J. L. 257 388, 610, 623
v. Jones, 21 Md. 432 492
v. Kartz, 13 R. I. 528 565
v. Kearney, 1 Hawks. 53 580
v. Keith, 63 N. C. 140 472
v. Kennedy, 76 N. C. 251 275
v. Kennon, 7 Oh. St. 546 388
v. Lake City, 25 Minn. 204 603
v. Leidtke, 9 Neb. 464 608
v. Little Rock R. R., 31 Ark. 705 603
v. Manning, 14 Tex. 502 473
v. Maxey, 1 McMul. 501 584

	SECTION
State *v.* Maze, 6 Humph. 17	620
v. Mead, 71 Mo. 266	603
v. McBride, Rice, 400	524
v. McCann, 21 Oh. St. 198	586
v. McGinnis, 37 Ark. 362	421
v. McPherson, 9 Iowa, 53	524
v. Morgan, 40 Conn. 44	565
v. Morrow, 26 Mo. 131	629
v. Newark, 27 N. J. L. 185	567, 610
v. Nicholls, 30 La. An. 1217	611
v. Northern Belle Co., 13 Mo. 250	413
v. O'Neil, 24 Wis. 149	601
v. On Gee, 15 Nev. 184	425
v. Parker, 26 Vt. 357	601
v. Perry, 5 Oh. St. 497	385
v. Pike, 15 N. H. 83	524
v. Platt, 2 S. C. 150	603
v. Randall, 2 Aik. (Vt.) 89	524
v. Ricker, 29 Me. 84	617
v. Runyon, 41 N. J. L. 98	404
v. Scott, 17 Mo. 521	601
v. Shadle, 41 Tex. 404	603
v. Shares of Stock, 5 Blatch. 231	216
v. Slaughter, 70 Mo. 484	627
v. Sneed, 25 Tex. 66	472
v. Snow, 3 R. I. 64	560
v. Spencer, 38 Me. 30	560
v. Stricker, S. C. Iowa, 1882	425
v. Sullivan, 14 Rich. L. 281	473
v. Swift, 10 Nev. 176	603
v. Swisher, 17 Tex. 441	601
v. Swope, 72 Mo. 399	543
v. Thomas, 47 Conn. 546	474, 565
v. Town of Union, 33 N. J. L. 350	603
v. Trenton, 38 N. J. L. 64	628
v. Tutt, 2 Bailey, 44	524
v. Vanderpool, S. C. Ohio, 1883	357
v. Voorhees, 32 N. J. L. 141	542, 543, 547
v. Warren, 28 Md. 338	568
v. Weir, 33 Iowa, 134	601
v. Wheeler, 44 N. J. L. 88	565
v. Whittemore, 50 N. H. 245	524
v. Whitworth, 8 Lea, 594	613
v. Wilcox, 42 Conn. 364	601
45 Mo. 458	601
v. Williams, 2 Rich. L. 418	472
5 Wis. 308	472
v. Worden, 46 Conn. 349	579
v. Young, 32 N. J. Law, 29	603
State Bank *v.* Bank of Cape Fear, 13 Ired. 75	481
v. Plainfield Bank, 34 N. J. Eq. 450	304
Steamboat Ohio *v.* Stunt, 10 Ohio St. 582	609
Steamship *v.* Port Wardens, 6 Wall. 31	424
Stephen Hart, The, Blatch. Pr. C. 387	226
Stevenson *v.* Payne, 109 Mass. 378	214
Stewart *v.* Father Matthew Society, 41 Mich. 67	603
Stiel *v.* Mayor of Sunderland, 6 H. & N. 796	609
Stiles *v.* Easley, 51 Ill. 275	214
Stilz *v.* Indianapolis, 55 Ind. 515	485
St. Joseph *v.* R. R., 39 Mo. 476	491
St. Joseph's Church *v.* Providence, 12 R. I. 19	413
St. Lawrence, The, 1 Gall. 467	216
St. Louis *v.* Ferry Co., 11 Wall. 423	430
v. Green, 7 Mo. App. 468	603
St. Luke's Hosp. *v.* Barklay, 3 Blatch. 259	170
Stockdale *v.* Hansard, 11 Ad. & E. 253	608
Stoddard *v.* Harington, 100 Mass. 87	495
Stokes *v.* People, 53 N. Y. 164	473
Stone, *in re*, 129 Mass. 156	584
Stone *v.* Brown, 54 Tex. 331	603
v. Mississippi, 101 U. S. 814	486, 565
Story *v.* R. R., 90 N. Y. 122	570
Stoughton *v.* Taylor, 2 Paine, 653	247
Strait *v.* Strait, 3 MacArth. 415	279
Strauder *v.* West Virginia, 100 U. S. 303	521, 585, 586
Strauss *v.* Heiss, 48 Md. 292	603, 623
Strother *v.* Lucas, 12 Pet. 410	154
Stuart *v.* Laird, 1 Cranch, 308	613
v. Palmer, 74 N. Y. 183	566, 588
Stuckey *v.* Mathes, 24 Hun, 461	275
Stupp, *in re*, 11 Blatch. 124	147
Sturges *v.* Crowninshield, 4 Wh. 122	381, 439, 440, 492, 493, 524
Sturgis *v.* Hull, 48 Vt. 302	610
Sullivan *v.* Steamboat Co., 6 Wheat. 450	520
Sunbeam, The, Blatch. Pr. C. 316, 638, 656	233
Supervisors' Case, 14 Mass. 247	388
Supervisors *v.* Dennis, 96 Penn. St. 400	492
v. Heenan, 2 Minn. 330	603
v. People, 25 Ill. 181	603
v. Post, 94 U. S. 260	603
Surtees *v.* Ellison, 4 M. & R. 586	472
Sutton *v.* Fox, 55 Wis. 531	474, 494
v. State, 9 Ohio, 133	381, 524
Suydam *v.* Williamson, 24 How. 427	526, 567

	SECTION
Swann v. Buck, 40 Miss. 268	497, 268
Swart v. Kimball, 43 Mich. 443	581
Sweet v. R. R., 79 N. Y. 293	569, 603
Swift v. Smith, 102 U. S. 442	603
v. Tyson, 16 Pet. 1	526
v. U. S., 14 N. & H. 481	613
Sydam v. Senott, 20 Alb. L. J. 230	546

T.

Talbot v. Hudson, 16 Gray, 417	565, 574
v. Jansen, 3 Dal. 133	201
Tarble, *in re*, 13 Wall. 397	534, 535
Tate, *ex parte*, 39 Ala. 264	456
Taylor v. Best, 14 C. B. 487	167
v. Carryl, 20 How. 583	527
v. Morton, 2 Curt. 454	383, 506
v. Penns. Co., 78 Ky. 348	337
v. Porter, 4 Hill, N. Y. 140	566
v. Taintor, 16 Wall. 366	541, 545, 547
v. Taylor, 10 Minn. 107	611
v. State, 31 Ala. 383	602
Telegraph Co. v. Texas, 105 U. S. 460	422
Templeton v. Horne, 82 Ill. 491	492
Tennessee v. Sneed, 96 U. S. 69	492
Terrett v. Taylor, 9 Cr. 43	479, 485
Territory v. Lee, 2 Montana, 124	462
Terry v. Anderson, 95 U. S. 628	492
Texas v. Chiles, 21 Wall. 288	526
v. Gaines, 2 Woods, 342	521
v. White, 7 Wall. 700	212, 372, 378, 551, 593
Thomas v. Acklam, 2 B. & Cres. 779	600
v. Dakin, 22 Wend. 9	603
v. Hatch, 3 Sumn. 170	526
Thompson, The, 3 Wall. 155	195 *b*
Thompson v. Alger, 12 Mete. 428	440
v. Lee Co., 3 Wall. 327	526
Thorne v. Cramer, 15 Barb. 112	601
Thorpe v. R. R., 27 Vt. 140	487
Thurlow v. Massachusetts, 5 How. 504	425, 486
Thurston v. Thurston, 6 R. I. 296	567
Tiernan v. Rinker, 102 U. S. 123	421, 422, 426
Tilford v. Ramsey, 43 Mo. 410	600
Tilton v. Swift, 40 Iowa, 78	610
Tindal v. Drake, 60 Ala. 170	567
Tobin v. Walkinshaw, 1 McAl. 186	432
Todd v. Flournoy, 56 Ala. 99	567
Toledo, etc. R. R. v. Jacksonville, 67 Ill. 37	488
Tootal's Trusts, 23 Ch. D. 532	253
Torladé v. Barrozo, 1 Miles, 366	167

	SECTION
Towanda Bridge, *in re*, 91 Penn. St. 216	575
Towne v. Smith, 1 W. & M. 115	495
Townsend v. Todd, 91 U. S. 452	526
Township v. Marcy, 92 U. S. 289	526
v. Skinner, 99 U. S. 255	526
Trade Mark Cases, 100 U. S. 82	372, 426, 450
Transportation Co. v. Chicago, 99 U. S. 635	420
v. Parkersburg, 107 U. S. 691	430
v. Wheeling, 99 U. S. 273	430
Trask v. Green, 9 Mich. 358	600
Trebilcock v. Wilson, 12 Wall. 687	519
Triquet v. Bath, 3 Burr. 1480	119
Trustees v. McCaughey, 2 Oh. St. 152	493, 568, 603
v. Tatman, 13 Ill. 27	485
Turner v. Bank of North America, 4 Dall. 8	520
v. Baptist Union, 5 McLean, 344	506
v. Evans, 2 E. & B. 512	612
v. Maryland, 55 Md. 240; 107 U. S. 38	408
Twee Gebroeders, The, 3 Rob. Ad. 162, 336	191, 239
Twitchell v. Com., 7 Wall. 321	379
Two Friends, The, 1 Rob. Ad. 271	224
Tyler v. Defrees, 11 Wall. 331	455

U.

Underwood v. Lilly, 10 S. & R. 97	567
Union Canal Co. v. Gilfillin, 93 Penn. St. 95	492
Union Improvement Co. v. Com., 69 Penn. St. 140	491
Union Iron Co. v. Pierce, 4 Biss. 327	623
Union Pac. R. R. v. Atchison R. R., 26 Kans. 669	572
Union Pac. R. R. v. U. S., 99 U. S. 700	422
Union Pass. R. R. App., 81* Penn. St. 91	603
University v. People, 99 U. S. 309	413, 481, 482, 493
Unity v. Burrage, 103 U. S. 447	600, 603
Upham v. Supervisors, 8 Cal. 378	601
U. S. v. Almeida, Whart. Prec. § 1061	617
v. Ames, 1 W. & M. 76	461
v. Anderson, 9 Wall. 56	389
v. Bainbridge, 1 Mason, 71	456

	SECTION
U. S. v. Bales of Cotton, 25 Law Rep. 451	297
v. Bales of Cotton, 10 Int. Rev. Rec. 52	389
v. Beef Slough Co., 8 Biss. 421	420
v. Benner, 1 Bald. 234	167
v. Bevans, 3 Wheat. 336	523
v. Block, 4 Sawy. 211	561
v. Bott, 11 Blatch. 346	555
v. Bowen, 100 U. S. 508	625
v. Briggs, 9 How. (U. S.) 351	622
v. Brown, 1 Sawy. 531	564
v. Bunton, 10 Fed. Rep. 730	586
v. Buzzo, 18 Wall. 125	561
v. Claflin, 97 U. S. 546	623
v. Coppersmith, 4 Fed. Rep. 198	561
v. Collins, 2 Curt. C. C. 194	580
v. Cornell, 2 Mason, 60	461, 524
v. Cruikshank, 92 U. S. 542	372, 376, 437, 524, 556, 586
v. Davis, 5 Mason, 356	461
v. DeWitt, 9 Wall. 41	425, 486
v. Ebert, 1 Cent. L. J. 205	561
v. The Etta, 13 Am. L. Reg. 38	250
v. Ferreira, 13 How. 40	388
v. Field, 16 Fed. Rep. 780	561
v. Fisher, 2 Cranch, 358	609
v. Gale, 109 U. S. 65	468
v. Gibert, 2 Sumn. 19	562
v. Germaine, 99 U. S. 508	511
v. Gratiot, 14 Pet. 526	463
v. Greathouse, 2 Abb. U. S. 364	467, 507
v. Grossmeyer, 9 Wall. 72	214
v. Guillem, 11 Howard, 47	219
v. Guinet, 3 Dall. 321	249
v. Harris, 106 U. S. 629	586
v. Hall, 98 U. S 343	461
v. Hayward, 2 Gratt. 485	155
v. Hertz, Whart. Prec., § 1123	247
v. Heyward, Cir. Ct. Mass. 1877	555
v. Homeyer, 2 Bond. 217	216
v. Huckabee, 16 Wall. 434	216
v. Hudson, 7 Cranch, 32	524
v. Hughes, 8 Ben. 29	472
v. Hutes, 12 Am. L. Reg. 735	455
v. Isham, 17 Wall. 496	561
v. Jailor, 2 Abb. U. S. 265	534
v. The James Morrison, Newb. Ad. 241	427
v. Jones, 3 Wash. C. C. 209	472
v. Kazinski, 2 Sprague, 7	247
v. Kellar, 13 Fed. Rep. 82	431
v. Klein, 13 Wall. 128	216, 388
v. Lafontaine, 4 Cr. C. C. 173	167
v. Lathrop, 17 Johns. 4	524
v. Lee, 107 U. S. 189	528, 569, 570, 573, 587
v. Lincoln Co., 5 Dill. 184	493
v. Magill, 4 Dall. 426	36, 523
v. Mann, 1 Gall. C. C. 3	561
v. Marigold, 9 How. 560	524
v. Marselis, 2 Blatch. 108	448
v. Martin. 14 Fed. Rep. 817	434
v. Memphis, 97 U. S. 284	482
v. Moore, 95 U. S. 760	511
v. Munford, C. C. E. D. Va. 1883	468
v. New Bedford Bridge, 1 W. & M. 401	420
v. Newcomer, 22 Int. Rev. Rec. 115	586
v. O'Brien, 3 Dill. 381	542
v. Oregon Nav. Co., 16 Fed. Rep. 524	569
v. Padelford, 9 Wall. 531	467, 510
v. Palmer, 3 Wheat. 610	621
v. Petit, 11 Fed. Rep. 58	561
v. Railroad Co., 17 Wall. 322	409
91 U. S. 72	611, 612
v. Reese, 92 U. S. 214	468, 486, 586
v. Reiter, 4 Am. L. Reg., N. S., 534	212
v. Repentigny, 5 Wall. 211	154
v. Reynes, 9 How. 127	154
v. Reynolds, 98 U. S. 145	360, 553
v. Shares of Stock, 5 Blatch. 231	216
v. Shawnees, 5 Chic. Leg. News, 352	434
v. Sixty-five Terra Cotta Vases, 18 Fed. Rep. 508	625
v. Skinner, 2 Wheel. C. C. 232	247
v. Smith, 5 Wheat. 153	118
1 South, 33	524
v. Stanley, 109 U. S. 3	586
v. Stearns, 2 Paine, 300	524
v. Stevenson, 3 Benedict, 119	216
v. Taylor, 12 Chic. Leg. News, 416	586
v. Tobacco Factory, 13 Int. Rev. Rec. 91; 1 Dill. 264	434
v. Tynen, 11 Wall. 88	623
v. Union Pacific Co., 98 U. S. 569	566
v. Wilson, 7 Pet. 150	509

SECTION

U. S. v. Wiltberger, 5 Wheat. 76 461
v. Worrall, 2 Dall. 384 25
v. Yates, 6 Fed. Rep. 861 561
v. Yellow Sun, 1 Dill. 271 434
Utica v. Churchill, 33 N. Y. 161 409

V.

Vail v. Knapp, 49 Barb. 299 331
Valarino v. Thompson, 3 Seld. 576 167, 170
Vallandigham, *ex parte*, 1 Wall. 243 518
Van Allen v. Assessors, 3 Wall. 573 409
Vance v. Vance, 108 U. S. 99 492
32 La. An. 186 493
Van Fossen v. State, 37 Oh. St. 317 279
Van Ness v. Packard, 2 Pet. 137 25
Van Riper v. Parsons, 40 N. J. L. 123 627
Van Voorhis v. Brintnall, 86 N. Y. 18 274, 275
Varden v. Mount, 78 Ky. 86 566
Veazie Bank v. Fenno, 8 Wall. 533 407, 413
Veazie v. Moore, 14 How. 568 426
Venice v. Murdoch, 92 U. S. 494 526
Venus, The, 8 Cr. 253 216, 219
Victory, The, 2 Sprague, 226 197
Vietor v. Arthur, 104 U. S. 498 625
Villato's Case, Whart. St. Tr. 185 201, 249
Vincennes University v. Indiana, 14 How. 268 465, 481
Vinsant v. Knox, 27 Ark. 278 603
Virden v. Brig Chas. A. Sparks, 13 Weekly Notes, 300 424
Virginia, *ex parte*, 100 U. S. 339 585, 586
Virginia v. Rives, 100 U. S. 313 585, 586
v. West Virginia, 11 Wall. 39 530
Von Hoffman v. Quincy, 4 Wall. 535 479, 493
Vrow Anna Catharina, The, 5 Rob. Ad. 20 239
Vrow Elizabeth, The, 5 Rob. Ad. 10 218

W.

Wabash Co. v. Beers, 2 Black, 448 481
Wabash R. R. v. People, 105 Ill. 236 422, 489
Wade v. Industrial School, 43 Md. 178 627
v. Richmond, 18 Gratt. 583 485

SECTION

Wagner v. Bissell, 3 Iowa, 396 25
Wakefield v. Phelps, 37 N. H. 295 625
Walcott v. People, 17 Mich. 68 422
Waldo v. Wallace, 12 Ind. 569 381
Walker v. Caldwell, 4 La. An. 297 621
v. Com., 17 Wall. 648 526
v. Griffith, 60 Ala. 361 603, 606
v. Whitehead, 16 Wall. 317 493, 494
v. Sauvinet, 92 U. S. 90 379
v. State, 35 Ark. 386 566
v. State, 12 S. C. 200 603
v. State, 49 Ala. 329 603
v. State, 7 Tex. Ap. 245 623
Wall, *ex parte*, 107 U. S. 265 566, 581
48 Cal. 279 601
Wallace v. Trustees of Sharon, 84 N. C. 164 485
Wallach v. Van Riswick, 92 U. S. 202 467
Wallworth v. Holt, 4 Myl. & Cr. 695 30
Walnut v. Wade, 103 U. S. 683 603
Walter v. People, 32 N. Y. 147 473
Walthall v. Walthall, 42 Ala. 450 494
Walton v. State, 62 Ala. 197 611
Ward v. Flood, 48 Cal. 36 586
v. Maryland, 12 Wall. 418 409, 421, 422
Ware v. Hylton, 3 Dall. 199 216
v. Miller, 9 S. C. 13 492
Waring v. Mayer, 8 Wall. 110 421
Warner v. People, 2 Denio, 272 497
Warren v. Com., 37 Penn. St. 45 473
v. Marcy, 96 U. S. 96 526
Washington v. Page, 4 Cal. 388 621
Wason v. Walter, L. R. 4 Q. B. 73 397
Watkins, *ex parte*, 7 Pet. 568 25
Watson v. Blaylock, 2 Mill. Const. 351 624
v. Bourne, 10 Mass. 337 495
v. Mercer, 8 Pet. 88 493, 567
v. Tarpley, 17 How. 517 526
Watts v. Everett, 47 Iowa, 269 492
Way, *in re*, 41 Mich. 299 584
Weaver v. Lapsley, 42 Ala. 601 455, 603
v. Lawrence, 1 Dall. 156 23
Webb v. Baird, 6 Ind. 13 609
v. Den, 17 How. 576 494
Webber v. Donelly, 33 Mich. 469 319
v. Virginia, 103 U. S. 344 408, 421, 422, 450
Weber v. Harbor Commissioners, 18 Wall. 57 572
Webster v. Carter, 14 How. 488 566
Weightman v. Clark, 103 U. S. 256 404
Welch v. Cook, 97 U. S. 541 413

SECTION

Welch *v.* Nash, 8 East, 394 615
v. Wadsworth, 30 Conn. 149 493
Welfman, *in re*, 20 Vt. 656 603
Wells, *ex parte*, 18 How. 307 509
Wells *v.* Bain, 75 Penn. St. 39 368
Wells, Fargo & Co. *v.* Oregon Co., 8 Saw. 600 619
Welton *v.* Missouri, 91 U. S. 282 421, 423, 534
Welveart Van Pillaw, The, 2 Rob. Ad. 128 235
West Chester R. R. *v.* Miles, 55 Penn. St. 209 586
West River Bridge *v.* Dix, 6 How. 507 488
West. Union Tel. Co. *v.* Am. Union Tel. Co., 19 Am. L. Reg. 173 446
v. Axtell, 69 Ind. 199 618
v. R. R., 11 Fed. Rep. 1 446
v. Pac. Nat. Tel., 5 Nev. 102 422
Westervelt *v.* Gregg, 12 N. Y. 202 588
Weston *v.* Charleston, 2 Pet. 449 409
Wetherbee *v.* Johnson, 14 Mass. 412 524
Wheaton *v.* Peters, 8 Pet. 591 25, 30, 111, 450, 526
White *v.* White, 105 Mass. 325 388
v. Hart, 13 Wall. 646 376, 594
hitehead *v.* Latham, 83 N. C. 232 492
Whitaker *v.* Haynes, 49 Cal. 596 623
Whitney *v.* Whiting, 35 N. H. 457 495
Wickersham *v.* Savage, 58 Penn. St. 365 480
Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; 102 Ill. 560 404, 410, 420, 427
Wilch *v.* Phelps, Sup. Ct. Nebr. 1883 450
Wilcox *v.* Jackson, 13 Pet. 498 504
v. Nolze, 34 Oh. St. 520 542
Wilkins *v.* Elliott, S. C. U. S. 1883 340
Wilkinson *v.* Leland, 2 Pet. 627 508, 526, 566, 615
William, The, 5 Rob. Ad. 385 233
William Bagaley, The, 5 Wall. 377 219, 467
William Harris, The, Ware, 367 147
Williams's App. 72 Penn. St. 214 493
Williams's Case, Whart. St. Tr. 652 201, 249

SECTION

Williams *v.* Armroyd, 7 Cr. 423 196
v. Cammack, 27 Miss. 209 601
v. Louisiana, 103 U. S. 637 482, 603
v. Oliver, 12 How. 111 519
v. Pritchard, 4 D. & E. 2 623
v. Rose, L. R. 3 Ex. 5 615
v. State, 48 Ind. 306 603
v. Wayne Co., 78 N. Y. 561 413
v. Williams, 4 Seld. 545 621
Willing *v.* Bozman, 52 Md. 44 623
Willis *v.* Long Island R. R., 32 Barb. 398 609
Wilmot *v.* Rose, 3 Ell. & B. 563 622
Wilson, *in re*, 18 Fed. Rep. 33 561
Wilson *v.* Blackbird Creek Co., 2 Pet. 245 420
v. Brown, 58 Ala. 62 493
v. Gaines, 3 Tenn. Ch. 597 413
v. Gray, 117 Mass. 98 424
v. Herbert, 41 N. J. L. 454 627
v. Knubley, 7 East, 128 622
v. McNamee, 102 U. S. 572 188, 424
v. R. R., 64 Ill. 542 472
v. State, 2 Oh. St. 319 579
v. State, 33 Ark. 557 557
v. Wilson, 3 Binn. 557 23
Wilmington R. R. *v.* Reid, 13 Wall. 264 482
Windsor *v.* McVeigh, 93 U. S. 274 527, 566
Wingfield *v.* Crosby, 5 Cold. 241 38
Winona, etc. R. R. *v.* Blake, 94 U. S. 180 489
Winterbottom *v.* Wright, 10 M. & W. 109 615
Wiswall *v.* Sampson, 14 How. 52 527
Witman *v.* Lex, 17 S. & R. 88 23
Worthen *v.* Badgett, 32 Ark. 496 603
Wolff *v.* New Orleans, 103 U. S. 358 485
Wong Yung Quy, *in re*, 6 Sawy. 237 534
Wood *v.* Kennedy, 19 Ind. 68 493
v. Priestner, L. R. 2 Ex. 66 612
v. R. R. 72 N. Y. 196 615, 618
v. Wagnon, 2 Cranch, 9 520
Woodruff *v.* Baldwin, 23 Kan. 491 603
v. Parham, 8 Wall. 123 408, 422
v. Scruggs, 27 Ark. 26 493
Woods *v.* Wilder, 43 N. Y. 164 214
Worcester *v.* Georgia, 6 Pet. 515 389
Work *v.* Carrington, 34 Oh. St. 64 545, 547

	section
Wright *v.* Brown, 44 Penn. St. 224	480
v. Com., 77 Penn. St. 470	557
v. Dunham, 13 Mich. 414	494
v. Fitzgerald, 27 St. Tr. 765	38
Wynehamer *v.* People, 3 Kern. 378	578
Wynkoop *v.* Cooch, 89 Penn. St. 450	581
Wynne, *in re*, Chase Dec. 227	602

Y.

	sect
Yarmouth *v.* North Yarmouth, 34 Me. 411	3
Yeaton *v.* U. S., 5 Cranch, 281	4
v. Fry, 5 Cr. 335	1
Yerger, *ex parte*, 8 Wall. 85	1
Yuffrow Maria, The, 3 Rob. Ad. 147	1

Z.

Zollverein, The, Swab. 96	6